

**CONFLICTING DISCOURSES IN CANADIAN
ABORIGINAL POLITICS:
A CASE STUDY OF THE FIRST NATIONS
GOVERNANCE INITIATIVE**

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THESIS ABSTRACT

Early in 2001 the federal government launched the First Nations Governance Initiative (FNGI), the centre piece of which was a bill to amend the *Indian Act*. This thesis utilizes the events and discussions that surrounded the preparation of the bill as a case study of contemporary Canadian Aboriginal politics and international debates on Indigenous rights. The approach taken is inspired by postcolonial studies and discourse analysis. The goal is to explain the current “dialogue of the deaf” between the federal government and First Nations leadership in terms of “discursive” divergences. The debates around the FNGI can be classified into two conflicting discourses. The first advanced by the Department of Indian Affairs, with a neo-liberal type of discourse, the discourse of good governance which emphasizes bureaucratic values of efficiency, transparency, and accountability. The second, advanced by a group of Aboriginal leaders and activists, is a discourse of self-determination, centred around inherent rights and the unconditional affirmation of Aboriginal sovereignty. The thesis provides an analysis that contributes to the understanding of current blockages in governance and policy reforms involving the federal and the Aboriginal governments.

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LIST OF ABBREVIATIONS

AFN	Assembly of First Nations
DIAND	Department of Indian Affairs and Northern Development
DDRIP	Draft Declaration on the Rights of Indigenous Peoples
FNGA	First Nations Governance Act
FNGI	First Nations Governance Initiative
IMF	International Monetary Fund
RCAP	Royal Commission on Aboriginal Peoples
UBCIC	Union of British Columbia Indian Chiefs
WGIP	Working Group on the Indigenous Peoples
WGDDRIP	Working Group on the Draft Declaration on the Rights of Indigenous Peoples

CHAPTER 1:

THE FIRST NATIONS GOVERNANCE INITIATIVE IN CONTEXT

1. 1. Historical context

By our own efforts, over the last decade, we have successfully re-asserted our sovereignty as Indian Nations in our own homelands and have begun to re-establish our international personality in the courts and political assemblies of the world. But there is much work to be done. While we have been trussed up and gagged in Canada for the better part of this century, the international community of nations has been re-structured and a body of international law, which is not yet sensitive to our Indian concepts of nationhood, has come into use. In our enforced absence from world forums, nobody spoke for us and nobody contradicted Canada's definition of us as an insignificant and disappearing ethnic minority.¹

The beginning of the twenty-first century shows a lot of promise for the Aboriginal peoples of Canada. Advances made by them in the political arena, starting with the entrenchment of their Aboriginal and treaty rights in the Constitution in 1982, have been matched by some solid victories in Canada's highest court. In what is undoubtedly its most significant Aboriginal-rights decision to date, the Supreme Court in *Delgamuukw* finally recognized that Aboriginal title to land includes a right to exclusive use and occupation that encompasses natural resources.²

As these quotations illustrate, the progress made in the last few decades in the judicial field in favour of Aboriginal interests and rights has been without precedent. Western domestic and international law have become more receptive to Aboriginal voices and claims – to the point where it has become a significant tool used by Aboriginal communities to affirm and defend their rights against the intrusive initiatives of governments and private companies.

In the political field as well, debates and opportunities progressively make more and more room for First Nations views and actors. One of the most symbolic and promising steps forward was the recognition of Aboriginal rights in section 35 of the repatriated *Constitution Act* (1982). This marked the beginning of a new era in politics, allowing for the inclusion of

¹ Solomon Sanderson, "Foreword," in Delia Opekokew, *The First Nations: Indian Government in the Community of Man* (Regina: Federation of Saskatchewan Indian Nations, 1982), p. ix.

² Kent McNeil, "Aboriginal Rights in Transition: Reassessing Aboriginal Title and Governance," *The American Review of Canadian Studies* (2001), 328.

Aboriginal partners in the constitutional discussions and in the political arena in general. The recognition, still under construction, of a specifically Aboriginal place within Canadian society can be exemplified by the creation of the Nunavut territory in 1999 and the establishment of self-government agreements in the 1990s, notably the Nisga'a Treaty and the Sechelt Self-Government Act in British Columbia, the Cree-Naskapi Act in Quebec and the Yukon Self-Government Act³.

The Report of the Royal Commission on Aboriginal Peoples (RCAP), published in 1996, was a landmark in this evolution. It proposed to build a new relationship – “a new partnership [which would be] much more than a political or institutional one. It must be a heartfelt commitment among peoples to live together in peace, harmony and mutual support.”⁴ The radical changes recommended by the Commission are still far from being implemented, however. Despite the tremendous recent progress, the relationships between the Canadian government and the Aboriginal communities of Canada are still difficult. The persistence of tensions and conflicts is documented regularly in the media. The most striking events, still in the memory of the spectators, were notably the Oka and Ipperwash crises respectively in 1990 and 1995. Although such events are rare, the memories are marked and an atmosphere of distrust and confrontation remains, as the on-going fishery issues in the Atlantic provinces or the reactions to Minister Nault's reform of the *Indian Act* continue to show today. This climate is well illustrated by Matthew Coon Come, Grand Chief of the Assembly of First Nations (AFN):

I think there are some people who are willing to take drastic measures. ... We lived through Oka, we lived through Ipperwash, we lived through Burnt Church. ... We're going to continue to push the government for our issues – they'll have to deal with treaties, they'll have to deal with aboriginal title.⁵

1. 2. International context

The tensions noted earlier at the national level also exist in the international arena, although in a euphemized form, and can be illustrated by the aggressive and contradictory declarations of both Aboriginal leaders and government officials on the international scene. For instance,

³ Cf. Martin O'Malley, “Canada's Oldest Nations.” *CBC News Online*, <<http://cbc.ca/news/indepth/aboriginals>> (Retrieved in January 2002); Canada: Dept. of Indian Affairs and Northern Development, *First Nations in Canada* (Ottawa Minister of Public Works and Government Services Canada, 1997).

⁴ RCAP, volume 1 “Looking Forward, Looking Back,” in *Highlights from the Report of the Royal Commission on Aboriginal Peoples: People to People, Nation to Nation*, from the CD-Rom For Seven Generations, Published by Libraxus Inc.

⁵ Chief Matthew Coon Come quoted in Justine Hunter, “Native Aim to Exploit Liberal Rift,” *National Post*, 20/07/01.

during the last World Conference Against Racism in Durban, South Africa, Matthew Coon Come talked about “the oppression, marginalization and dispossession of Indigenous peoples” (in Canada) and underlined “the racist and colonial syndrome of dispossession and discrimination.”⁶ At the same time, the Canadian delegation at the Working Group on the Draft Declaration on the Rights of Indigenous Peoples (DDRIP), under the authority of the United Nations, still acknowledges with difficulty the reality of the right to self-determination for Canadian Indigenous peoples.⁷

These international attitudes are particularly important for both theoretical and practical reasons. Theoretically, they contribute to the definition of common features and recurrent key issues regarding specific Indigenous peoples’ concerns and problems all over the planet. Thus, particular Canadian situations are to be included in larger analytical frameworks so that localized events can simultaneously inform and be informed by Aboriginal politics in general – at the national and international level. Practically, because international organizations, and the United Nations forums and working groups in particular, have now become significant places for the advocacy of indigenous rights and their protection:

Indigenous spokespersons now contest their dislocations in common international fora, where, by degrees, they develop overlapping strategies, alliances and, finally, vocabulary. Indeed, it can be said that a world-wide culture of indigenous people’s resistance is emerging, and growing⁸

This has been particularly true of the Working Group on the Indigenous Peoples (WGIP), created by the United Nations Commission of Human Rights in 1982. Its mission is twofold: first, “the monitoring of developments affecting indigenous peoples”; and second, “the formulation of a set of standards that could guide indigenous/state relations”⁹. This Working Group, chaired by Erica-Irene A. Daes and composed of independent experts, meets every year in Geneva for one- or two-week working sessions and hears testimonies from spokespersons of very diverse status, Indigenous representatives, NGOs and state representatives. Its most significant achievements so far have been the completion in 1994 of a Draft Declaration on the Rights of Indigenous Peoples and the establishment of a Permanent Forum for Indigenous Peoples. It has also contributed to give a “voice” to Indigenous communities in the international arena and has accelerated the evolution of national states’ positions regarding the rights of their Indigenous populations:

⁶ *Windspeaker*, October 2001 issue, page 7.

⁷ Mai-vân Clech Lâm, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Ardsley, N.Y: Transnational Publishers, 2000).

⁸ Lâm, 48.

⁹ Lâm, 43.

In any event, two things are now clear: a large majority of states is ready to recognize the right of indigenous peoples to self-determination; at the same time, nearly all states seek to limit the right from being exercised to alter their boundaries. ... In some respects, the WGIP has done for indigenous and tribal peoples what the General Assembly once did for the Third World, which was to open up a forum for the world's newly independent states to voice their vision of their identity and destiny in a condition of formal equality with others materially far more powerful than they.¹⁰

Moreover, the Canadian attitude in the international arena and in forums such as the United Nations is of the utmost importance because Aboriginal politics, just as politics in general, are not exempt from the influence of major contemporary political trends, visible not only in the national policies of the individual countries but also in the management practices of the international organizations and in inter-state relationships.

1.3. Presentation of the First Nations Governance Initiative

In such a context, the First Nations Governance Initiative (FNGI) proposed by the Department of Indian Affairs and Northern Development (DIAND) at the beginning of the year 2001 illustrates the particular situation of contemporary Canadian Aboriginal politics. Although dealing only with First Nations peoples and the *Indian Act* in particular, this reform project produced many controversies and non-negotiable positions. The debates about, and content of, this initiative illustrate the influence of current political (ideological) trends on Aboriginal politics and governance.

Briefly, the FNGI is a project to amend the key federal legislation concerning Canadian Aboriginal populations: the *Indian Act*. This legislation, enacted in 1876 in response to clearly paternalistic and even racist preoccupations, has been since modified a few times but the changes have often been disappointing and superficial. The reform is intended by the Department of Indian Affairs and Northern Development (DIAND) to be an “interim step” or a “bridge” towards self-government. The approach chosen by the federal government is practical and incremental: the current reform deals only with the most immediate concerns in order to “supply the tools missing from the *Indian Act* and pave the way for greater self-reliance, economic development and hope among First Nations communities.”¹¹

¹⁰ Lâm, 82.

¹¹ As explained by Robert Nault, Minister of Indian Affairs at the Conference *Beyond the Indian Act* held April 18, 2002. Speaking notes available at <http://www.fng-gpn.gc.ca/RM_bynd_e.asp> (Retrieved in June 2002).

Concretely, this means first updating the electoral system for band councils. The Supreme Court's *Corbière* decision calls for amendments to allow off-reserve band members to participate in elections and referenda (a right previously reserved only for on-reserve members). Also, council mandates could be lengthened (three or four years instead of two, for example). Secondly, the legal status of band councils is to be clarified and enhanced. The federal authorities are concerned by the absence of clear legal status for band councils – their legal capacities (to enter into commercial contracts or to sue and be sued) have been clarified by courts but there are no consistent and ready-to-use rules in these matters. This can cause problems when the bands seek to undertake economic development activities. The modification proposed would also enhance band councils' authority to implement and enforce by-laws. Thirdly, the FNGI aims at making the band councils more accountable to their members and less to Ottawa. These two last sets of reform are particularly important because of their eventual implications on the institutionalized interactions between bands and the federal government. Recently, another aspect has been added to the project, and the *First Nations Governance Act* (FNGA) introduced to the House of Commons on 14 June 2002 now includes a section stipulating that the *Indian Act* will no longer be exempt from the *Canadian Human Rights Act*.

Another important feature – and certainly the most criticized – of the FNGI has been its consultation methods. The intent of the Department was to reach “grass-roots” First Nations members and hear their views on these governance issues. More than 400 public meetings have been organized in every region of Canada, a questionnaire was mailed to selected households, and reactions were also welcomed by phone and on a governmental internet site exclusively devoted to the project¹².

The FNGI will be used here as a case study, to illustrate the experiences and difficulties faced by First Nations in Canada and Indigenous populations in general. For this purpose, the approach chosen will be analytical and will interpret both contemporary government policy and the opposition it provoked in terms of “discourses”. The thesis is not concerned with strict policy analysis – which could constitute a paper in itself. The content of the reform and its eventual consequences will be mentioned, but this does not constitute the main purpose of the analysis. Instead, I will argue that the content of the reform is relatively less important than the reform process itself – the fact the government decided to modify the *Indian Act* (once again) and the manner it is using to do so. What will be studied more in detail are the debates surrounding the launch of the initiative and the introduction of the corresponding bills in the

¹² <<http://www.fng-gpn.gc.ca>>.

Parliament: Bill C-61 in the spring session of 2003, Bill C-7 in the fall parliamentary session of 2003. The reform has not yet been voted on in Parliament,¹³ so the initiative is still in progress and debates evolve constantly. The study will thus focus on the debates and events of the years 2001 and 2002 only – to limit the scope of primary sources to be used. Nevertheless, the underlying goal is to describe and analyze some deep and persistent trends in Canadian Aboriginal politics; thus, the arguments and conclusions drawn from events that happened within the aforementioned timeframe can be applied and tested on former policies and debates and especially on further developments around the *Indian Act*.

1.4. Theoretical framework

“Discourse”, according to Foucault, is to be understood as a “framework of meaning”, expressing itself through speeches and written works, and based on a defined set of intellectual hypotheses and internal logics¹⁴. “Discourse” is a very broad notion that encompasses more than simple oral or written communication – it is also made of ways of thinking and ways of acting. It is very closely linked to language and, more precisely, to the use of particular concepts and arguments. A discourse is not a fixed structure; on the contrary, it is historically contingent and politically constructed. The importance of the concept of “discourse” lies in its relationships with power and the exercise of power. In his article “Power and Insight in Policy Discourse,” Douglas Torgerson associates discourse analysis with post-positivism in policy studies. He notes that such a method of analysis “encourages attention to policy discourse, generally in terms of meaning, but particularly in terms of an interplay, between power and insight.”¹⁵ The concept is also to be linked with hermeneutics, critical theory, and deconstruction. The definition he proposes of hermeneutic inquiry is quite relevant to this present study:

Hermeneutic inquiry is concerned with how human beings understand themselves and one another through a shared scheme of categories that renders meaningful a world of interpersonal relationships and institutions. ... The ground of inquiry thereby shifts from objective facts to shared meaning.¹⁶

¹³ At the time of writing, i.e. February 2003.

¹⁴ Michel Foucault, *L'Archéologie du Savoir* (Paris : Editions Gallimard, Collection NRF, 1969).

¹⁵ Douglas Torgerson, “Power and Insight in Policy Discourse: Post-positivism and problem definition,” in *Policy Studies in Canada: the State of the Art*, eds. Laurent Dobuzinskis, Michael Howlett, and David Laycock, (Toronto: University of Toronto Press, 1996), 266.

¹⁶ *Ibid.*, 272 & 273.

Similarly, the thesis is less concerned with some in-depth textual analysis than with reintroducing contemporary Aboriginal policies and political debates within a particular “episteme”,¹⁷ as the historically variable but essential interdependency between power, knowledge and discourse. I follow in this sense a Foucauldian approach of the concept:

[A]gainst a pan-textualism which might claim that everything can ostensibly be analysed as a text, as a language, Foucault points out that the power in language stems from, external, material and technical forms of power. ... [O]ne should approach discourse not so much as a language, or a textuality, but as an active “occurring”, as something that implements power and action, and that also is power and action. Rather than a mere vocabulary or language, a set of instruments that we animate, discourse is the thing that is done, “the violence ... which we do things.”¹⁸

This approach places the emphasis on contextual practices, the symbolic character of social relations and the performative nature of power rhetoric. What interests us here is the construction of the contemporary discourses at stake in Canadian Aboriginal politics today – their sources, internal logics, and purposes as well as their ramification with wider intellectual (and ideological) frameworks. This construction is not to be understood as a conscious and rational process but instead as the powerful product of the interplay of power relationships and of the diverse strategies and ideas of the actors. “Discourse,” as defined here, is the equivalent of what Foucault calls a “discursive formation,” that is to say “a regular body of ideas and concepts which claim to produce knowledge about the world.”¹⁹ This definition helps us understand how inherently intellectually limiting a discourse is: “every discourse constitutes a set of limits on a range of possible practices.” This limitation is the source of the permeability of one discourse to the other. Communication from one discourse to the other is either impossible or spurious because words are connoted differently according to the discursive formation in which they are used. Meanings and implications are changed when travelling from one to the other – resulting in misunderstandings or vacuity. Within this theoretical perspective, the support and opposition to the FNIGI will be reinterpreted as the expression of two different and hardly reconcilable discourses. These discursive divergences allow a better understanding of the sterility of the contemporary debates around the FNIGI.

Finally, I would like to underline the relevance of these theoretical issues to the field of Aboriginal politics. As Edward Said explained when dealing with Orientalism, Western domination did express itself, and still does today, by a confiscation of the “voice”, that is to say

¹⁷ Hubert Dreyfus and Paul Rabinow, *Michel Foucault: un parcours philosophique*, translated from English (Paris: Gallimard, 1984), 37.

¹⁸ Derek Hook, “The ‘Disorders of Discourse’,” *Theoria*, (June 2001), 51 & 53.

¹⁹ Howard, 116.

that the colonial authorities have monopolized the legitimate “discourse” of the “Other”. This loss of voice, this condemnation of the “other” to be an object of study or policies and not a subject or an actor, has been over the centuries a key feature of the situation of Indigenous peoples throughout the world. They now progressively regain voice in the settlers’ states and also at the international level, as noted earlier, but their voice still suffers from “otherness” and often needs legitimization by either Western science or Western law to be heard. Neo-colonialism, associated here with the contemporary forms of internal colonialism in the Anglo-Saxon world, can characterize Western states’ practices of indirectly reshaping the legitimate “voice” on Aboriginality and using “symbolic violence,” mainly via control and paternalism, in their relationships with their own Native communities.

This thesis examines the oral and written communications of the diverse actors as only the visible part of the discourse in itself – like the emerged part of an iceberg. The goal is to explain what these communications tell us about the deeper intellectual and even ideological frameworks influencing Aboriginal politics. The next step is to identify distinct discourses and use these findings to make sense of the current political dynamics around the *Indian Act* and the First Nations Governance Initiative.

1.5. Organization of the thesis

The central research question in this study is: are good governance processes and self-government projects reconcilable and even complementary, or are they opposed in their very nature and evolution? To answer this question, the thesis aims at identifying two discourses within the political field concerned with Aboriginal issues, in Canada especially, and will assess their degree of opposition. Each of the two core chapters is devoted to a particular discourse, its context and rhetoric.

The first discourse, the “good governance” discourse, is examined in the second chapter. The chapter compares the approach taken by the Canadian government to impose its model of public management upon First Nations with that used by international funding organizations, in their recent development policies, to impose a particular democratic model on the African continent. This democratic model is strongly inspired by both neo-liberalism and Weber’s bureaucratic model. In this context, the FNGI will be interpreted as the concrete application of these new governing strategies to the *Indian Act* and the First Nations’ polity.

The second discourse, the “self-determination” discourse, is the topic of the third chapter. The affiliations of the diverse political actors are less clear in this case because the vocabulary is very variable. However, specific discourses based on concepts such as inherent (or treaty) rights or right to self-government can be easily understood as particular types of the overall “self-determination” discourse. At the international level, these ideas are expressed most directly by the diverse United Nations forums for Indigenous peoples, while in Canada they have been reported and endorsed by the RCAP and by many First Nations leaders (the AFN and the Union of British Columbia Indian Chiefs (UBCIC) for instance). Their radical opposition to the FNIGI, formulated in 2001 and reiterated in 2002 and 2003 while the bill was being reviewed by the House of Commons Standing Committee on Aboriginal Affairs, is also better understood within the framework of the “self-determination” discourse.

The fourth and concluding chapter assesses the irreconcilability of these discourses and the state of affairs concerning the reform of the *Indian Act*. Finally, it also anticipates the future of both the FNIGA and the *Indian Act*.

CHAPTER 2:

THE DISCOURSE OF “GOOD GOVERNANCE” AND ITS IMPACT ON CANADIAN ABORIGINAL POLITICS

This chapter provides a discourse analysis of the FNGI. It regards this reform project as a Canadian expression of a broader discourse: the discourse of good governance that focuses on the importance of governance institutions in installing and sustaining economic development in impoverished countries and communities. The arguments of this chapter can be summed up as a series of nested propositions.

- 1) There is such a thing as a discourse of “good governance”.
- 2) This discourse is ideologically orientated – it is influenced by neo-liberalism.
- 3) This discourse is culturally orientated – it defends a very particularistic model of western liberal democracy.
- 4) The FNGI constitutes a revealing example of the Canadian Aboriginal version of such a discourse.
- 5) This discourse is problematic – internal flaws exist and the “good governance” prescriptions often fail to achieve their own goals in terms of democracy and efficiency.

2.1. Concepts

The discourse of “good governance” is more than a discourse *about* what is “good governance”, it is a discourse determined and shaped by the concept of “good governance” itself, by the specific meanings and presuppositions it carries. The usage of a particular vocabulary is never innocuous; especially when organizations as powerful as the World Bank or the Canadian federal government use it as a theoretical foundation for lending policies in the case of the former and Aboriginal policies in the case of the latter. Looking at the historical and

contemporary meanings of these terms is not superfluous and can give useful insight into the sometimes hidden but always pervasive agendas carried through such rhetoric.

2.1.1. Governance

“Governance” has been a fashionable term in the political science literature of the last decades, notably in the fields of international relations and of policy analysis. Because of its success, the term became polysemous and its diverse meanings blurred. Today, “governance” is a rather flexible concept that applies to many different aspects of societal and political reality. Less specialized writers tend to use the term interchangeably with “government”. It is indeed striking that in the 1991 edition of the *Oxford English Encyclopaedia*, the first definitions given for “governance” and “government” are identical: “the act or manner of governing”. The main differences between the two political concepts are therefore to be found in the connotations they carry : while “government” tends to refer to a state-related authority, “governance” is used as “a kind of catch-all to refer to any strategy, tactic, process, procedure or programme for controlling, regulating, shaping, mastering or exercising authority over others in a nation, organisation and locality”¹.

The concept of “governance” is closely linked to broader contemporary phenomena, such as globalization and decentralisation. The two trends illustrate a common rationale: governments and centralized state institutions tend to lose the monopoly of governing activities – as phrased by R.A.W. Rhodes:

Governance is the product of the hollowing-out of the state from above (for example, by international interdependencies), from below (for example, by special-purpose bodies [here, new types of local jurisdictions]), and sideways (for example, by agencies). As a result, there has been a decline in central capacity.²

We can observe this trend, “the hollowing-out of the state,” at many different levels of government. At the national level, public services and administrations are increasingly decentralized and privatized. At the international level, we witness a growth of supranational regulations and institutions (the European Union being here the most advanced example). More generally, the model of the Nation-State seems threatened by the erosion of national political power and the strength of international economic pressures. In the communities, people are often attracted towards more participative forms of democracy, while adaptive and

¹ Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999), 1.

² R.A.W. Rhodes “Governance and Public Administration” in Jon Pierre, ed., *Debating Governance: Authority, Steering and Democracy* (Oxford: Oxford University Press, 2000), 71.

inclusive networks develop as new modes of management. That is why the term “governance” is used today extensively in various sub-fields of political science. In the theoretical field of international institutions and regimes, it refers to international interdependence and “global governance,”³ focusing on “the role of international agencies and inter-state agreements and common commercial governmental practices (like arbitration) as methods of governance.”⁴ In the field of public management, the concept raises issues concerning public administration and the public sector generally – issues arising from the privatization of publicly owned industries, the contracting out of public services and the introduction of commercial/private sector’s practices and management styles within the public sector.⁵ The term is also used in the field of social theory and particularly networks theory:

The socio-cybernetic approach highlights the limits of governing by a central actor, claiming there is no longer a single sovereign authority. In its place there is a great variety of actors specific to each policy area ; interdependence among these social-political-administrative actors; shared goals; blurred boundaries between public, private and voluntary sectors ; and multiplying and new forms of action, intervention, and governing⁶.

Finally, in the field of economic development, which is the most relevant to our present analysis, “governance” refers to “the manner in which power is exercised in the management of a country’s economic and social resources for development.”⁷

The diverse uses of the term “governance” correspond to different but interdependent methodological stances – that is to say different lenses through which one can look at and make sense of the state of contemporary national and international politics. For this reason, “governance” is a key concept in the study of the modern state and of the challenges it faces today: namely, the stress imposed by supranational forces or internal centrifugal forces, such as active minority groups among which Indigenous movements occupy a very specific and important position. The flexibility of the concept is particularly significant for our present study: indeed, the “governance” vocabulary and the “good governance” discourse may be developed in similar terms both at the national level (the situation of internal colonialism) and at

³ See works by James Rosenau, such as: James N. Rosenau and Czempiel Ernst-Otto, ed., *Governance Without Government Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992); see also works and article by Zaki Laïdi, available on his personal website <www.laidi.com>, for instance: Zaki Laïdi and Pascal Lamy, “La gouvernance où comment donner sens à la globalisation,” Rapport pour Le Conseil d’Analyse Economique (Paris: La Documentation Française, 2002) or Zaki Laïdi, “Mondialisation et démocratie,” *Politique Étrangère*, N° 3, 2001.

⁴ P. Hirst, “Democracy and Governance” in *Debating Governance: Authority, Steering and Democracy*, ed. Jon Pierre (Oxford: Oxford University Press, 2000), 15.

⁵ *Ibid.*, 18.

⁶ Rhodes, 58.

⁷ from Webster’s New Universal Unabridged Dictionary (London: Dorset and Barber, 1979); definition quoted in World Bank, *Governance and Development* (The World Bank: Washington D.C., 1992), 3.

the international level (the situation of economic imperialism). The common denominator here is the uses of “governance” theory for purposes of political modernization and economic development.

Another useful understanding of the concept of “governance” is provided by N. Rose in the first section of his book *Powers of Freedom*, entitled “Governing.” This author distinguishes between a normative and an analytical usage of the term. On one hand, the term is used normatively and “good governance” refers then briefly “to political strategies seeking to minimize the role of the state, to introduce the new public management and generally alter the role of politics in the management of social and economical affairs.”⁸ On the other hand, the term is used in descriptive analyses of government and politics and “the new sociology of governance is focusing on the interactions of a range of political actors (the state is only one among those) and on self-organizing networks.”⁹ Both aspects are part of the discourse of “good governance” since a discourse is not only an intellectual tool for observing, understanding and explaining the reality but it also provides a set of values, judgements and prescriptions. The last aspect is, however, the most significant when looking at public policies and reform – since their goal is to improve a system considered as inappropriate, outdated and generally deficient. Moreover, the phrase “good governance” itself calls for a normative interpretation of “governance.”

2.1.2. “Good governance”

Good government and governance have become almost an obsession in current debates about development. There has been a flood of academic texts, an increasing number of conferences and a growing focus upon them by bilateral donors and multilateral institutions such as the Commonwealth, the ECA and the World Bank.¹⁰

The World Bank has been the most prolific institution on the topic of “good governance.” The starting point is a 1989 report, *Sub-Saharan Africa from Crisis to Sustainable Growth*, where the Bank acknowledges the role of political institutions in economic development. The approach would be implemented during the 1990s and remains in place today. The foreword to the 1992 report, *Governance and Development*, by then President of the World Bank Lewis T. Preston, reads:

Good governance is an essential complement to sound economic policies. Efficient and accountable management by the public sector and a predictable and transparent political

⁸ Rose, 1.

⁹ Rose, 3.

¹⁰ Williams & Young, 84.

framework are critical to the efficiency of markets and governments, and hence to economic development.

“Good governance” is understood here as a narrow and particularistic approach of “good government” – where politics are purely instrumental to economic ends. This approach can be explained by the specific mandate of the World Bank: the institution is indeed not authorized to take into account non-economic factors in its lending policy.¹¹ Therefore, its concern with good government is limited to “managerial and institutional issues relating to bureaucratic reforms, policy analysis, improving co-ordination and what it calls the “efficiency” of public service.”¹² But as we shall see later, such an instrumental conception of politics constitutes paradoxically a significant political intrusion and imposition on the countries and communities concerned.

Analysts of the World Bank, and of international development policies in general, tend to distinguish two usages of the expression: “the political use of governance refers to a state enjoying both legitimacy and authority, derived from a democratic mandate [while] the administrative use refers to an efficient, open accountable and audited public service.”¹³ This distinction manifests itself within the recommendations by a separation between technical areas and civil society areas. First, in the technical (administrative) areas, “good governance” involves “improving policy analysis and ‘budget discipline,’ improving training and bureaucratic procedures, reforming the civil service, particularly the reduction of overmanning, improving bureaucratic co-ordination and establishing a distinction between public office and private person.”¹⁴ Second, “good governance” is concerned with strengthening civil society and democratic participation.¹⁵ The discourse of “good governance” reintroduces politics and institutions in development policies, and reaffirms the role of political modernization in successful economies.

Finally, “good governance” is both a diagnostic and a remedy. It furnishes criteria ready-to-use to evaluate the quality of a country/community institutional framework. It also provides solutions to “bad governance” situations (often associated with corruption). This logic is quite narrow and tautological. “Good governance” – regarded as the key determinant of economic growth – is both means and end: crudely, problematic countries or communities should attain governance by implementing good governance principles. There is little reflection or critique

¹¹ According to Articles of Agreement III 5b, IV 10, and V 5c.

¹² Williams & Young, 85.

¹³ Rhodes, 57.

¹⁴ Williams & Young, 87.

¹⁵ *Ibid.*

on why “good governance” is actually good, why it should be achieved, or why economic growth – associated most of the time with GDP (gross domestic product) growth – should be sought in an indiscriminate manner. These particular features of circular and self-performative logic are fundamental in the construction of “good governance” as a discourse, defined as a framework of meaning. Moreover, the growing consensus around the timeliness and appropriateness of the concept “governance” to describe the contemporary post-Cold War world and very diverse phenomena of globalization also fit nicely with the notion of “discursive formation” defined by Michel Foucault as “a regular body of ideas and concepts which claim to produce knowledge (truth) about the world.”¹⁶

2.2. The intellectual context

As a discourse, “good governance” is thus culturally and historically situated as well as ideologically orientated. It is culturally situated because it defends a western conception of democracy. The model of government supported by the expression “good governance” is particularistic – not only does it define democracy as a universally applicable and desirable model of government, but it also advocates a very specific version of this democracy: liberal, procedural, and bureaucratic. It is also historically situated, because it acknowledges the failures of the past (lending policies based solely on financial needs in the case of the World Bank, or paternalistic and controlling Indian administration in the case of the DIAND) and also because it tries to adapt to contemporary challenges (economic globalization and weakening of the traditional nation-state model). More importantly, good governance is concerned as much with economics as with politics. This fits with an instrumental approach of democracy – government and institutions are considered as means for a wealthier economy and not as ends in themselves. These orientations are inspired by neo-liberalism and its distrust of the state apparatus and of public managing. The present section will thus look at the neo-liberal component of the discourse of “good governance”. This will then allow for a better understanding of the model of democracy defined and promoted by the discourse.

¹⁶ David Howarth, “Discourse Theory,” in *Theory and Methods in Political Science*, eds., D. Marsh and G. Stoker (New York: St. Martin's Press, 1995), 116.

2.2.1. Neo-liberalism and development

Neoliberal refers to economic ideas that advocate the reduction and transformation of the state, more frequent use of monetarist policy instruments, and a shift in public-private relations in the direction of greater support for (and increased reliance on) the private sector. Neoliberal ideas also morally justify or legitimate these changes in the name of greater efficiency, personal liberty and choice.¹⁷

Neo-liberal ideas are inspired by classical and neo-classical political economy and are very influential on contemporary policy making. Neo-liberal prescriptions aim at analysing social and political issues from an economic point of view – in terms of costs and benefits, individual interests, financial incentives and competitiveness. Neo-liberal ideas are widespread around the globe, both among industrialized countries and developing countries. This is to be related to the “triumph of neo-classical economics.”¹⁸ Thomas J. Biersteker talks about the growing consensus around ideas inspired by neo-classical political economy:

In nearly every developing country in the world today, short-term stabilization measures, structural adjustments programs, liberalization efforts, and economic reforms are being considered, attempted, and adopted. Although there is tremendous variation in the details of the programs being initiated, nearly all entail a reduced role for the state in the economy and greater reliance on market mechanisms.¹⁹

Policy reforms inspired by neo-liberal ideas have been promoted by international financial organizations such as the World Bank and the International Monetary Fund (IMF) since the beginning of the 1980s and continue to be promoted today. These policies are a “far cry from the extensive state interventionism, economic nationalism, and state socialist experimentation found in much of the developing world during the 1960s and 1970s.”²⁰ Good governance is a particular version of these ideas – recognizing the need for static infrastructures and thus softening the prescriptions in terms of “reducing, cutting or paring back the role of the state”²¹ as part of the attempts to rationalize and enhance the efficiency of the state.

When dealing with issues of economic and political development, the neo-liberal stance ignores the structural influence of the world markets and other international influences – and refuses the suggestions proposed by *dependencia* and other critical theories:

¹⁷ Ngaire Woods, “Economic Ideas and International Relations,” *International Studies Quarterly* 39, 2 (June 1995), 162; quoting T.J. Biersteker, “The ‘Triumph’ of Neoclassical Economics in the Developing World: Policy Convergence and Bases of Governance in the International Economic Order,” in *Governance without Government*, ed. J.N. Rosenau & E.-O. Cziempiel (1992) and P.T. Bauer, *Reality and Rhetoric: Studies in the Economics of Development* (London: Weidenfeld and Nicholson, 1984).

¹⁸ Biersteker, “The ‘Triumph’ of Neoclassical Economics”, 107-110.

¹⁹ Thomas J. Biersteker, “Reducing the Role of the State in the Economy: A Conceptual Exploration of IMF and World Bank Prescriptions,” *International Studies Quarterly*, 34, 4 (December 1990), 477.

²⁰ *Ibid.*, 478.

²¹ *Ibid.*

For example, the cause of developing countries' debt problem of the 1980s is attributed by neoliberals to the borrowing countries themselves. ... By contrast, structuralists or *dependencistas* lay the blame squarely at the door of international financial system, the IMF (as its representative), and commercial banks for the hardships endured by countries having to repay large debts.

Instead, the supporters of the "good governance" discourse underline the inadequate responses or adjustment of the countries/communities concerned to the contemporary world economy. Their earlier economic failures are blamed on their lack of adjustment – either because they did not want to adjust or simply could not adjust. N. Woods explains for instance:

In the neo-liberal view, blame for earlier excesses was cast onto those who had not "adjusted" or could not seem to adjust In many countries, neo-liberalism contrasted dramatically with old, clientelistic political orders, and was therefore positioned in the political arena as the way toward a new, more transparent and less corrupt political order.²²

This approach is the one defended by the United States and used in justifying its reduced and conditional aid to Third World countries. At the occasion of the United Nations Financing for Development Conference held in March 2002 in Monterrey, Mexico, "after months of rejecting entreaties to increase foreign aid on the grounds it often goes to waste, the Bush administration reversed course ... and proposed to grant an additional \$5 billion over three years to poor countries that adopt *sound economic policies* and *attack corruption*."²³ President Bush explained in his speech at the Conference:

I am here today ... to call for a new compact for development defined by greater *accountability* for rich and poor nations, alike. ... When nations close their markets and opportunity is hoarded by a privileged few, no amount – no amount – of development aid is ever enough. When nations respect their people, *open markets*, invest in better health and education, every dollar of aid, every dollar of trade revenue and domestic capital is used more *effectively*. ... We will promote development from the bottom up, helping citizens to find the tools and training and technologies to seize the opportunities in the global economy. ... When trade advances, there is no question but the fact that poverty retreats.²⁴

Poverty is blamed on these nations' lack of economic competitiveness and their maladjustment to global trade and markets. The fault is placed on the victim both for not adapting and for being disorganized and inefficient (often corrupt), but not on the overall structure, i.e., the capitalist economic system or historical colonialism. The same accusations are discernible in the

²² Woods, 176.

²³ Paul Blustein, "Bush Seeks Foreign Aid Boost," *Washington Post*, 15 March 2002, A01. Emphases are my own.

²⁴ George W. Bush, "President Outlines U.S. Plan to Help World's Poor," *Remarks by the President at United Nations Financing for Development Conference, Cintermex Convention Center, Monterrey, Mexico* (22 March 2002) <<http://www.whitehouse.gov/news/releases/2002/03/20020322-1.html>> (Retrieved 15 May 2002).

Canadian federal government's attitude towards First Nations. The influence of the opposition, such as that provided by the Reform Party for instance, might be an extra incentive for the government to consider issues of self-governance in terms of economic viability and reduction of the costs for the central institutions. The inappropriateness of the Western model of democracy to developing countries, especially in Africa, has been underlined by many specialists – as well as the inaccuracy of developmentalist theories or the inappropriateness of aid programs.²⁵ The same arguments can be made regarding the Fourth World, that is to say the Indigenous communities living within settler societies – the Canadian case interesting us especially here.

2.2.2. Idealization of the rational-bureaucratic model of democracy

The prescriptions of the “good governance” discourse focus on establishing a modern and rational bureaucracy – as defined in the Weberian analysis of the state. The idea of democratic government defended fits the legal-rational model of authority as developed by Weber. It relies on a strong, rationally organized, and efficient bureaucracy. This bureaucratic ideal-type supposes clear, explicit, and accessible rules, a non-arbitrary hierarchy based on meritocracy, a written codification of the rules and of the roles assigned to the public servants, and a strict separation between their professional life (the function) and their personal life (the person). Legitimacy in such a system is based on the rationality, the legality and thus the predictability of the bureaucratic apparatus. In the discourse of ‘good governance’, this leads to the promotion of a procedural version of democracy – focusing on elections, public participation, and civil society. It focuses on liberal values of democracy and ignores the importance of societal choices. Clearly, modernity and modern politics are more or less consciously associated with Western liberal values and the democratic model of pluralism:

The focus upon the construction of civil society is important for understanding the Bank's position on democracy. It has shied away from outright advocacy of democracy preferring instead to focus upon the values of liberal democracy (participation, accountability, legitimacy and so on...)²⁶

In other terms,

The good governance strategy is based on creating in non-western developing countries a version of the social architecture of classical liberalism, that is, a clear separation between a limited state and a largely self-regulating civil society and market economy.²⁷

²⁵ Woods, 173.

²⁶ Williams & Young, 88.

²⁷ Hirst, 14-15.

The Weberian rational-legal model of government is thus used in a prescriptive manner to attempt a modernization of the political systems of non-Western groups. The use of Weber's theory of government goes further, since the models can also be used as analytical tools. Similarly, the traditional systems of government as well as the contemporary problems with nepotism, patronage, and clientelism can be interpreted in the light of the charismatic or traditional models of political legitimacy. The same types of considerations, expectations of patronage, personalized approach of politics, and absence of secularization of the political realm also merit a lot of attention in the study of Aboriginal politics. However, the supporters of good governance and developmentalist theories are not concerned with this type of analysis; on the contrary, they consider these types of behaviour as dysfunctional. They are considered as abnormal and doomed to disappearance in the future if the correct policies are not followed and the modernizing pattern is not sustained. As the following case studies will demonstrate, the path to an effective rational-legal model of government is not so clear and straightforward.

2.3. The rhetoric of "good governance"

In both the international economic development version of the discourse and the "Aboriginal governance" version, we find the same vocabulary, arguments, and prescriptions. Publications and speeches from the Canadian federal government and the Bretton Woods institutions echo each other almost perfectly. First, they argue that good governance, its practices and predicaments, are objective and based on scientific knowledge from fields such as public administration, international relations and political economy. Similarly, they consider good governance to be apolitical – they draw on the presupposed scientific nature of and the emerging consensus around liberal and neo-liberal ideas in the Western world to affirm the objectivity and common-sense nature of their propositions. Second, they both support a minimalist conception of the state, either directly formulated in terms of budget cuts and privatizations (as we have seen in the preceding section) or expressed through their support for the decentralization and the delegation of powers. Third, the concept of accountability is omnipresent, with its three keywords: transparency, disclosure, and redress. This section will review each of these features more in detail so that the reader can identify and later on recognize the lexicon of "good governance".

2.3.1. *A scientific and apolitical discourse*

This is not about politics, I really want you to know this. This is about people. It's about improving people's lives. Why would, as I said before, any minister undertake something that is perceived by the non-native media at least so far as being controversial? And it's not intended to be controversial. It's intended to improve people's lives and I want you to keep that in mind because I'm not interested in playing politics with first nation people's lives. I'm interested in making progress.²⁸

The attempted neutrality of Minister Nault when presenting the government's project to reform the *Indian Act* is not a new strategy in politics – neither is it specific to good governance. We find here the old populist trick, where politicians denounce their own partisan behaviours. Partisan and ideological politics have nowadays a bad media impact and are often interpreted as a misplaced defence of personal or corporatist interests.²⁹ The so-called neutral stance is quite useful because it allows speakers to discredit any opposition to the proposed “common-sense” project. This type of argument has been indeed used against the Aboriginal leaders who were most opposed to the reform by the supporters of the FNGI but also by the media. For example, journalists such as Justine Hunter, Robert Fife and Rick Mofina for the *National Post* group, but also some Aboriginal commentators in local newspapers,³⁰ maintain that the Aboriginal leadership, and especially the influential national organizations such as the AFN, are acting as a very particular and elite interest group, representing chiefs elected under an alien colonial system, the *Indian Act*. They would naturally favour the *status quo* because of their artificial political position. The powers they have are dependent on the present system and they would seek to protect them, even to the detriment of democracy in their hands. Such an interpretation may certainly be useful to the understanding of the situation, but it remains simplistic and insufficient.

The vocabulary of neutrality, science, and non-political stance, though not original, should still be noted since it is particularly consistent with the overall discourse of “good governance”. Thomas J. Biersteker, when studying the IMF and World Bank prescriptions, notes: “it is significant that most of the discourse on the subject treats it as a technical rather than a political

²⁸ Extracts from Minister Nault's speech on April 30, 2001 at the Siksika First Nation High School: “Robert Nault, Announces First Nations Governance Initiative”. <http://www.fng-gpn.gc.ca/RM_SPLaun_e.asp> (Retrieved September 2001).

²⁹ Surprisingly, lobbying activities seem to have a good audience but when the same behaviours are translated at the partisan or ideological level (actually less interest-driven), it seems to be regarded more negatively, as part of the usual but useless game of “politics”.

³⁰ See for example: Doug Cuthand, “Native Leaders Launch Public Relations Disaster,” *Saskatoon StarPhoenix*, 28/09/2001; Ken Noskiye, “New Indian Act Necessary,” *Saskatoon Sun*, 02/09/2001.

issue, and employs a neutral terminology of ‘adjustment’ and ‘reform’.”³¹ The scientific nature of the discourse is reinforced by its uses of specific academic paradigms such as the New Public Management or the New Public Economy – and more generally realist trends in political studies:

Rationalists of both the realist and the “new political economy” type assume that the outcomes from interactions among actors reveal choices made on the basis of interest-maximizing principles.³²

The discourse produced relies on economic interpretations of human behaviour (the model being the “homo economicus” – rational, calculating, and interest-driven) and defines democracy as a set of objective procedures. The systems of government – or rather the systems of public management – are evaluated not according to subjective or normative criteria but according to their *efficiency* and/or *effectiveness*. Measurable socio-economic data become the evidence used to qualify “good” or “bad” governance and more generally, statistics are used to silence dissidence and criticism.

Organizations spend a lot of time and money on enhancing the scientific side of their work and trying to convince the diverse actors of the consensual nature of their ideas and policies. Both the IMF and the World Bank devote considerable energy and financial resources to the task, and their current rhetoric is designed to create the impression that there is a strong consensus to reduce the degree of state intervention in the economy.³³ The same is true for DIAND. The organizations focus on technicalities – how to improve day-to-day governance – arguing for a bottom-up approach of economic development and political modernization³⁴. But instead, deeper questions about long-term political consequences or the choice of particular models for economic development are avoided. Very concretely, in the case of the FNIGI, the federal government focuses the attention of the public and of the media on how to improve the way the powers are exercised by the First Nations and the way leaders and public servants should be accountable to their Aboriginal community. However, crucial questions about the definition of the powers themselves – whether they are inherent (constitutional) rights or solely delegated jurisdiction – are either postponed or simply discarded.

³¹ Biersteker, 478.

³² Woods, 165.

³³ Williams & Young.

³⁴ Argument that seems ironical when the development of so-called “bottom-up” governance institutions is actually encouraged, defined and framed by the central authority (Bretton Woods financial institutions or the Canadian federal government) and do not leave room for local and traditional knowledge and savoir-faire. True bottom-up initiatives remain subjected to the approval of the central authority.

2.3.2. Decentralization and delegation

The modern bureaucracy proposed by the discourse of “good governance” is also a decentralized democracy. The World Bank had indeed “encouraged decentralizing administration and strengthening local government.”³⁵ In the 1992 report entitled *Governance and Development*, the authors note:

Decentralization is an increasingly common phenomenon in Latin America, Asia and Eastern Europe. In theory, it can lead to significant improvement in efficiency and effectiveness by reducing overloading of central government functions and improving access to decisionmaking and participation at lower levels of government ...³⁶

The question of decentralization is particularly fundamental for Indigenous peoples since it is directly linked to their claims for sovereignty. Decentralizing the administration can indeed look like implementing self-government – by allowing the local communities to make their own decisions, provide services, and manage their moneys. At the political level, however, delegating powers is very different than recognizing existing powers or granting new powers. By encouraging decentralization and devolution of powers, the “good governance” strategies might indeed disguise what is merely an administrative reform into a step towards self-government.

The Minister of Indian Affairs has been referring a few times to the Indian bands government under the FNGA as “local government”:

In broad terms, we would like to look at sharing and developing best practices in the way first nations under the Indian Act govern themselves. We need to build a bridge towards full self-government. ... We have a firm commitment to support first nations communities by strengthening governance. ... This means a clear understanding of everyone’s rights and responsibilities and a recognition that first nations members are entitled to *effective, accountable and responsive local government*.³⁷

If interpreted as a further step towards decentralization, the FNGI and its discourse of good governance constitutes less a rupture than a continuity with past Indian policies, which had already been inspired by neo-liberalism and new public management. The transformation of the department from a service provider to a funding agency is not new :

Some of the DIAND’s priorities include: recognition of greater program and political authority of First Nations and territorial government by establishing a framework for the effective implementation of the inherent right of self-government; specific initiatives to implement self-government; continued devolution to territories of program administration; and assisting First Nations and Inuit Peoples in strengthening their

³⁵ Williams & Young, 87.

³⁶ World Bank, *Governance and Development* (The World Bank: Washington D.C., 1992), 21.

³⁷ Extracts from Minister Nault speech during his visit to the Siksika Nation in Alberta. See *supra* Note 28. Emphasis is my own.

communities. ... First Nations are increasingly taking charge of the services and programs that the department once managed ... Today, the department is becoming much more of an advisory, funding, and supportive agency in its relations with First Nations, Inuit and northerners.³⁸

The self-understanding of the department as a funding agency reinforces the parallel situation with the international Bretton Woods institutions and their behaviours towards developing countries. We face here situations inherited from disruptive and even destructive colonial relationships, characterized by a strong economic dependency, political domination, and finally the imposition of Western model of government (liberal procedural democracy) on non-Western populations. The main difference remain the nationhood status of the “peoples” concerned with the policies: on one hand, for the Third World, we have an affirmed situation of political independence and, on the other hand, for the Fourth World, Canadian Aboriginal populations in particular, we have a situation of political dependency – nationhood being refused as an official status. The power exercised by the Canadian federal government, when implementing “good governance” strategies in First Nations communities, is therefore stronger and more disempowering than the one exercised by international financial institutions on developing countries: the political and administrative reforms are not only part of the economic bargaining – being the conditions for financing and leaving therefore (at least in theory) the opportunity of non-financed dissidence/independency – but more importantly a reaffirmation of the legislative power of the federal government over its Aboriginal populations and its ultimate authority in choosing the modalities of good Aboriginal government.³⁹

2.3.3. *The key-words of good governance*

Good Governance is important for countries at all stages of development... Our approach is to concentrate on those aspects of good governance that are most closely related to our surveillance over macroeconomic policies – namely, the *transparency* of governments accounts, the *effectiveness* of public resource management, and the *stability* and *transparency* of the economic and regulatory environment for private sector activity.⁴⁰

Accountability is the key to “good governance” – it is greatly emphasized by all its supporters and often used to denounce corruption. Within the FNGI, accountability is central, it is even

³⁸ Canada: Department of Indian Affairs and Northern Development, “The Department of Indian Affairs and Northern Development (DIAND), December 1997.” <http://www.ainc-inac.gc.ca/pr/info/info108_e.html> (Retrieved January 2002).

³⁹ As we shall see in Chapter 3 – this affirmation of the ultimate power of the Canadian federal authorities over the political and economic choices is at the heart of the controversies around the FNGI, who would like to hear and see on the contrary an official recognition of their sovereignty and right to self-determination.

⁴⁰ Michel Camdessus, “Address to the United Nations Economic and Social Council on July 2, 1997,” *Good Governance: the IMF’s role* (IMF Publications : August 1997). Emphases are my own.

included in the title of the bill “an Act respecting leadership selection, administration and accountability of Indian bands, and to make the related amendments to other acts”. Accountability is associated with the triptych “transparency, disclosure and redress”. Similarly, the *First Nations Governance Initiative Consultation Package*⁴¹ explains that the key components of the type of governance promoted by the initiative are effectiveness and responsibility; more concretely this means a special emphasis on sound fiscal relationships based on an improved band council liability and political and financial accountability for decision making. In Bill C-7 (FNGA under the 37th Parliament, second session, started in September 2002 – the same bill was introduced in June 2002 during the first session as Bill C-61), a strict accountability code is proposed:

7. A financial management and accountability code must include rules respecting
 - (a) the preparation of an annual budget for each fiscal year, and its adoption by the council and presentation to members of the band during the last quarter of the preceding fiscal year;
 - (b) the control of expenditures of band funds, including financial signing authorities;
 - (c) internal controls with respect to deposits, asset management and the purchase of goods and services, including the manner of tendering for contracts;
 - (d) the lending of band funds to members of the band and other persons, the making of loan guarantees by the band to persons other than members, and the repayment and collection of funds loaned;
 - (e) the remuneration of members of the council and employees of the band;
 - (f) the incurring of debt by the band and debt management;
 - (g) the management of and limitations on the band's deficit; and
 - (h) the establishment of a procedure for amending the code.⁴²

More generally, Bill C-7 is reaffirming the values highlighted sooner: transparency, effectiveness, stability. The preamble reads indeed:

Whereas governments in Canada have certain capacities and powers facilitating *good governance, accountability and economic development*;

Whereas representative democracy, including regular elections by secret ballot, and *transparency and accountability* are broadly held Canadian values;

Whereas *effective* tools of governance have not been historically available under the *Indian Act*, which was not designed for that purpose;

Whereas bands, within the meaning of the *Indian Act*, require *effective* tools of governance...⁴³

⁴¹ Canada: Dept. of Indian Affairs and Northern Development, *Communities First: First Nations Governance Consultation Package*. (Ottawa: 2001).

⁴² Text of Bill C-61 available on the Canadian Parliament website at: <http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-61/C-61_1/C-61TOCE.html> (Retrieved 10 July 2002).

The assumptions of good governance identified earlier is made clear in these extracts: efficiency, transparency, accountability, representation, and economic growth, as the foundations of modern liberal democracy. The purposes' section focuses on "effectiveness" but is very eloquent as well:

3. The purposes of this Act are

- (a) to provide bands with more effective tools of governance on an interim basis pending the negotiation and implementation of the inherent right of self-government;
- (b) to enable bands to respond more effectively to their particular needs and aspirations, including the ability to collaborate for certain purposes; and
- (c) to enable bands to design and implement their own regimes in respect of leadership selection, administration of government and financial management and accountability, while providing rules for those bands that do not choose to do so.⁴⁴

The FNGA also values stability and predictability. This is especially visible in the sections devoted to the clarification of the legal standing and capacity of the band councils. The changes proposed in this area stem from the acknowledgement by federal authorities that the absence of clear legal status for band councils causes considerable problems when the bands seek to develop economic activities or undertake or respond to law suits. The modification proposed aims at clarifying the legal status of the band councils (in terms of contracting and suing especially) as well as their authority regarding the implementation and enforcement of by-laws⁴⁵. The same rhetoric is found in the documents explaining the World Bank's approach of good governance. The report titled *Governance and Development*, for instance, identifies key factors in the betterment of governance: rationalization of public sector management in order to improve the effectiveness and efficiency of the public agencies⁴⁶, encouraging auditing and accounting to promote accountability,⁴⁷ a predictable legal framework for development,⁴⁸ and finally information and transparency.⁴⁹ The World Bank, nevertheless, in contrast with DIAND, recognizes the fundamental role of legitimacy. It explains for example that:

[Governance] is a plant that needs constant tending. Citizens need to demand good governance. ... Although lenders and aid agencies and other outsiders can contribute resources and ideas to improve governance, for change to be effective, it must be rooted firmly in the societies concerned and cannot be imposed from outside.⁵⁰

⁴³ *Ibid.* Emphases are my own.

⁴⁴ *Ibid.*

⁴⁵ Article 15 of the bill, see Appendix D.

⁴⁶ World Bank, 13.

⁴⁷ *Ibid.*, 14-15

⁴⁸ *Ibid.*, 30.

⁴⁹ *Ibid.*, 39.

⁵⁰ *Ibid.*, 12.

The word “legitimacy” is not mentioned once in the text of the FNGA and almost never mentioned by the Department of Indian Affairs officials.

In the end, it seems that although the FNGI follows closely the precepts of good governance as defined by the international organizations, the version of “good governance” it proposes seems more restricted. The World Bank and IMF recognize, at least in theory, the importance of subjective and cultural factors. On the contrary, these factors seem completely overlooked by the “good governance” system proposed by the Canadian federal government. As the next section discusses, limits internal to the reform project can be identified and the discourse of “good governance” assessed according to its own criteria.

2.4. Evaluation of the “good governance” strategies

This section is concerned with evaluating the discourse of good governance according to its own criteria. In other terms, are the solutions proposed successful in eradicating “bad” governance and implementing “good” governance? And more importantly, does the implementation of good governance systems have the expected results on economic development and social welfare? The legitimacy and the efficiency of the good governance precepts and methods has been extensively studied and put in question at the international level. Many Third World leaders and academics complain regularly about the inappropriateness of the developing and lending policies of the diverse international financial institutions while *dependencia* and structuralist theorists denounce the inherent flaws of the good governance framework and the international relations model it presupposes. National experiences are also inconclusive: good governance might have worked better than other lending policies in its attempt to fight corruption notably but, while short- and middle-term effects seem to vary greatly from one country to the other, long-term effects of such policies are still to come.

An interesting study by Peter Evans and James E. Rauch⁵¹ looks at the effect of Weberian state structures on economic growth⁵². The criteria these authors have used are regrouped under what they call a “Weberian state data set” and include measurement of the input of public agencies in the formulation of economic policy, the modalities of recruitment of their higher

⁵¹ Evans, Peter & Rauch, James E. “Bureaucracy and Growth: a cross-national analysis of the effects of “Weberian” state structures on economic growth” in *American Sociological Review*, 24 (October 1999), 748-765.

⁵² As noted earlier, Weberian state structures and especially rationalized bureaucracy corresponds to the institutional model promoted by the discourse of good governance; similarly, economic growth – development in other words – is the main goal of good governance.

officials, their professional mobility, their career opportunities, their involvement in the private sector, their official salary in comparison with private sector managers with the same training, the importance of extra-legal sources of income in their revenue, the evolution of their legal income through time in comparison with private sector, modalities of access to the public career compared to a private career⁵³. The data have been collected in 35 countries over a period of three years. This study suggests that better democracy enhances prospects for economic growth and that good governance strategies are in a good direction, in terms of economic growth – compared to past strategies of simplistic state retreat. Nevertheless, when using regression methods to keep the other factors stable, the statistical correlations are quite weak. The causal links remain thus uncertain: it is difficult to decide if economic growth influences positively good governance or if good governance is the source of economic growth. Obviously, such causal relationships are not linear and involve instead many other factors. One of them could well be the legitimacy of both the political and economic systems in place in the countries concerned. The authors recognize themselves that the socio-economic conditions in which Weberian institutions operate could be an important determinant of this success.⁵⁴

Focussing on the Indigenous version of “good governance” will allow us to anticipate on the problems and prospects to expect from the eventual implementation of the FNGI. In recent years, special efforts have been made in the United States to delegate authority to Indian tribes in organizing their own affairs and in managing public funds and their economic development. Two American scholars, Stephen Cornell and Joseph Kalt,⁵⁵ have completed a comparative study of Indian self-government experiences in the United States in order to determine the key elements in economic development and political health for the Indian communities concerned. In the first chapter of the book “What can tribes do?”, Stephen Cornell and Joseph P. Kalt compare the development strategies of 15 selected Indian nations⁵⁶ in the USA and their outcomes. They look in particular at the “critical role institutions of tribal governance play in the development process.”⁵⁷ They sought “to explain why tribes differ in their economic development strategies and in the outcomes of those strategies, and to discover what it takes for self-determined economic development – development that meets tribal goals

⁵³ Evans & Rauch, 761-762.

⁵⁴ *Ibid.*, 761.

⁵⁵ Cornell, Stephen & Kalt, Joseph P. “Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations” in *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* (Los Angeles: American Indian Studies Center, University of California, 1992), 3-59.

⁵⁶ List of selected American Indian reservations: Flathead, White Mountain Apache, Cochiti Pueblo, Mescalero Apache, Mississippi Choctaw, Muckleshoot, Pine Ridge Sioux, Passamaquoddy, San Carlos Apache, Rosebud Sioux, Lummi, Hualapai, Yakima, Crow, Northern Cheyenne.

⁵⁷ Cornell and Kalt, 1.

– to be successful.” They also took the position that success itself should be evaluated on the basis of the tribes’ own criteria (and not according to Western socio-economic statistics).⁵⁸ In their study, political and bureaucratic features are considered as an important determinant of economic development – they write for instance: “in our research, two factors more than any others distinguish successful tribes from unsuccessful ones: de facto sovereignty and effective institutions of self-governance.”⁵⁹ However, these features do not operate independently but are embedded instead within a broader set of interdependent factors. Among these other factors, culture is very important. The authors note on this matter:

Unless there is a fit between the culture of the community and the structure and powers of its governing institutions, those institutions may be seen as illegitimate, their ability to regulate and organize the development process will be undermined, and development will be blocked. Without a match between culture and governing institutions, tribal government cannot consistently do its basic job: creating and sustaining the “rules of the games” that development in any society requires.⁶⁰

These remarks could explain further the problems encountered by the FNGL. The comparison between the American situation and the Canadian situation is very significant because the recent evolution of the Bureau of Indian Affairs and of DIAND in regard to policies and administrative organization are quite similar. The authors describe contemporary trends in Indian Affairs as the progressive “demotion of the Bureau of Indian Affairs’ role from decision-maker to advisor and provider of technical assistance”. The same is true of DIAND which described itself increasingly as a funding agency.⁶¹ The conclusions drawn by Cornell and Kalt from their American study are very illuminating for the current events around the FNGL. Of utmost significance is their affirmation of the primacy of sovereignty recognition over economic concerns:

The legal and de-facto sovereignty of tribes has been subject to constant challenge, and it is frequently asserted that if tribes wish to be sovereign, they must first establish sound, nondependent economies. Our research indicates that, for two basic reasons, this reasoning is *backwards*. First, as we have said, sovereignty brings with it accountability. ... Second, the sovereign status of tribes offers distinct legal and economic market opportunities.⁶²

The FNGL seems to address the problem “backwards” and does not attach enough importance to sovereignty issues. Finally, although not directly associated with theories and rhetoric of

⁵⁸ *Ibid.*, 3.

⁵⁹ *Ibid.*, 14.

⁶⁰ *Ibid.*, 10.

⁶¹ See Canada: Dept. of Indian Affairs and Northern Development, *DIAND's Evolution from Direct Service Delivery to a Funding Agency* (Ottawa, 1993).

⁶² *Ibid.*, 15. Emphasis is my own.

good governance, this study indirectly evaluates “good governance” institutions and recommendations according to its own sets of values and in an Aboriginal context. The study includes key governance institutions and strategies in a broader framework and points out its strengths and weaknesses. Indeed, the general conclusions seem to condemn further such government driven and administrative initiatives:

We believe the available evidence clearly demonstrates that tribal sovereignty is a necessary prerequisite of reservation economic development. Each present instance of substantial and sustained economic development in Indian Country is accompanied by a transfer of primary decision-making control to tribal hands and away from federal and state authorities. Sovereignty brings accountability (and not the contrary) and allows “success” to be properly defined to include Indians’ goals of political and social well-being along with economic well-being. Decades of control over reservation economic resources and affairs by federal and state authorities did not work to put reservation economies on their feet. ... Within that sphere, we believe the evidence on development success and failure supports the conclusion that tribal sovereignty over economic affairs should be founded upon a government-to-government relationship between Indian nations and the United States. ... Split or shared jurisdiction ... does not go far enough.⁶³

In the end, the authors defend a holistic/integrated model of Aboriginal self-government in which self-determination, sovereignty, independent decision-making, and legitimacy are considered as important as formal political and administrative organization.

Concluding remarks

In the end, the discourse of good governance is a powerful discourse. It is well organized, consistent, and supported by influential international organizations and many Western governments. It is also powerful because it draws on neo-liberal economic ideas that appear more and more to politicians and voters as the one and only alternative. Following the Foucauldian definition of “discourse” as the articulation of truth, power, and knowledge, “good governance” rhetoric and policy productions seem quite discursively efficient. Nevertheless, as suggested in the present exposé, “good governance” might not be the most exportable model of “good government”. Similarly, its claim to neutrality and indirectly universality is both pernicious and oppressive. On this particular point, D. Williams and T. Young conclude their article by reminding the reader that the concept of governance cannot be separated from its liberal roots and from the political projects it underpins:

Liberal thought and practice historically, and now in the form of governance, when faced with “difference” cannot be neutral or tolerant but does indeed have its own broad

⁶³ *Ibid.*, 52.

conception of the good, which it is engaged in imposing politically, legally, socially and culturally wherever it has the power to do so.⁶⁴

This statement is very illustrative of the current situation between the Canadian federal government and the First Nations. This inherent flaw of the discourse is, from my point of view, the root of the current controversy around the FNGI. In this case, the language of good governance serves as the medium of a multifaceted imposition. The FNGI, while proposing some interesting improvements to daily Aboriginal governance, remains embedded in a framework of internal colonialism. The power relationship disguises itself behind the mirage of universal economic efficiency. Past colonial relationships are wounds that are very difficult to heal in a country's history, but the recognition of the existence of such asymmetric and oppressive relationships is the first step towards reversing the balance and avoiding reinforcing them by ignoring them.

⁶⁴ Williams & Young, 100.

CHAPTER 3:

THE DISCOURSE OF SELF-DETERMINATION AND ITS CANADIAN EXPRESSIONS

Self-determination is the right and the ability of a people or a group of people to choose their own destiny without external compulsion. ... Self-government is a term which is often associated and sometimes used interchangeably with the terms self-determination and sovereignty. ... Self-determination, sovereignty and self-government are for some people dry and ultimately meaningless terms. For others, they are misleading loud bullets in the arsenal of rhetoric.¹

This definition is representative of how flexible and polysemous the concept of self-determination can be. It is often noted by international law commentators that self-determination is “one of the most contentious ideas in international law.”² One of the difficulties inherent to the idea of self-determination is to determine the legal status of such a principle. Some commentators view self-determination as “a political or moral principle rather than a legal right” while some others regard “the principle as one of customary international law.”³ This ambiguity is particularly intriguing in the Indigenous peoples’ case. This chapter provides a commentary on the contemporary directions taken by international law on this issue and approaches “self-determination” as a legal concept. However, the discourse of self-determination calls on a moral approach of self-determination: the idea that all peoples, including Indigenous peoples, are entitled to control their own destinies. This approach in terms of normative and human rights, calling on ethics instead of positivism, is the one expressed by most of the Indigenous groups in the world. It is well illustrated by the following definition given by the Royal Commission on Aboriginal Peoples:

The RCAP defines sovereignty as the “natural right of all human beings to define, sustain, and perpetuate their identities as individuals, communities and nations”; it is expressed through

¹ Frank Cassidy, “Self-Determination, Sovereignty, and Self-Government” in *Aboriginal Self-Determination: Proceedings of a Conference held September 30 – October 3, 1990*, ed. Frank Cassidy (Lantzville, BC. and Halifax, NS.: Oolichan Books and The Institute for Research on Public Policy), 1.

² Robert McCorquodale, ed., *Self-Determination in International Law* (Aldershot: Ashgate, 2000), xi.

³ Clive Parry & all, ed., *Parry and Grant Encyclopaedic Dictionary of International Law* (New York: Oceana Publications Inc., 1986), 361.

self-determination, “the freedom (of peoples) to choose the pathways that best express their identity, their sense of themselves and the character of their relations with others.”⁴

The approach of self-determination as an essential human right is also growing in international law, and this chapter will analyse some of the latest developments on this matter, focussing in particular on the work of the Working Group on Indigenous Peoples (WGIP) and the Working Group on the Draft Declaration on the Rights of Indigenous Peoples, both under the authority of the Sub-Commission on Prevention of Discrimination and Protection of Minorities which is an international agency affiliated to the Commission on Human Rights.

In this chapter, “self-determination” refers to an individual or a community building its own future on its own terms. This broader definition is more appropriate as it allows the discourse of self-determination to be a more flexible and encompassing categorization. Defined this way, the discourse of self-determination can then include multiple and diversified rhetorical strategies, notably the vocabulary of “inherent rights” and “self-government”. The short but meaningful statement by Chief Matthew Coon Come, currently Grand Chief of the Assembly of First Nations (AFN), is illuminating: “Our right to self-government and self-determination in the full international sense is an inherent right.”⁵ More generally, self-determination rhetoric, as noted by S. James Anaya in his seminal book on the topic, *Indigenous Peoples and Self-Determination*,⁶ is widely used in contemporary political discourse, and has played a crucial role for Indigenous movements in affirming and defending their rights within national states and at the international level:

No discussion of indigenous peoples’ rights under international law is complete without a discussion of self-determination, a principle of the highest order within the contemporary international system. Indigenous peoples have repeatedly articulated their demands in terms of self-determination, and, in turn, self-determination precepts have fueled the international movement in favor of those demands.⁷

The recent importance of Indigenous issues in the international arena is the result of several decades of Indigenous activism. In Anglo-Saxon settlers’ societies, Indigenous activism began to register on the Western political scene and in the media in the 1960s and 1970s.⁸ Within the political and democratic effervescence, Indigenous claims focused on the respect of human rights and the acquisition of public services for Indigenous communities and individuals, of

⁴ Joyce Green, “Options for Achieving Aboriginal Self-Determination,” *Policy Options*, March 1997, 13.

⁵ AFN, “Speaking Points For AFN National Chief Matthew Coon Come And Vice Chief Ghislain Picard At An Appearance Before The Standing Committee on Aboriginal Affairs.” February 28, 2002. <<http://www.afn.ca>> (Retrieved 23 May 2002).

⁶ Anaya, *Indigenous Peoples in International Law*.

⁷ *Ibid.*, 75.

⁸ For an alternative description of the contemporary Indigenous rights movement, see Anaya, 45-47.

which they were officially or practically deprived. The fight for decent living conditions and equal social opportunities, as well as that against racism and any other forms of discrimination, is still legitimate today and is present on the agendas of many Aboriginal organizations and political activists. In the new era of multiculturalism, means and arguments have changed and individual rights are now supplemented by collective rights. For the contemporary political elite concerned with Indigenous issues, both Indigenous and non-Indigenous individuals, the fight for the recognition of the cultural specificity of Indigenous populations and of the inherent rights attached to this particular status appear as being of the highest priority. This evolution within Indigenous activism is also to be understood in light of the Western policies directed at Indigenous populations.⁹ Policies of assimilation have now given way to policies of multiculturalism and recognition which enables the articulation of alternative voices and mounting defences of collective rights.

This chapter examines the discourse of self-determination, which is a discourse by which Indigenous groups in the world, and First Nations in Canada, affirm their inherent sovereignty. This discourse is intransigent and aims at correcting the physical and cultural damages and destruction that are the relics of centuries of colonialism. Not all actors articulate their arguments in the legal and rational form present in this chapter. Indeed some would argue that it is wrong to have to translate non-Western claims into a legal-rational framework supported by Western type institutions – the same institutions that, as noted in the previous chapter, have been denounced as being ethnocentric and colonial. This situation is paradoxical and the discourse of self-determination is a cogent illustration of the way non-Western populations utilize the very same tools the colonizers have used to oppress them in the past. They attempt to affirm themselves and their own rights within the oppressive framework itself – using the freeing features but also the inconsistencies of the liberal system. At the domestic level, this includes resorting to court challenges taken all the way to the Supreme Court and seeking not only statutory but also constitutional recognition. At the international level, this includes using international law and various United Nations' agencies to remind the settler states of their commitments to human and democratic rights.

This chapter consists of three sub-sections. The first sub-section examines the development of the principle of self-determination within international law and explains its understanding by Indigenous populations. The second and third sections are then devoted, in turn, to Canadian

⁹ For a detailed analysis of the recent evolution of federal public policy concerning Aboriginal Peoples of Canada, I would recommend here to consult the Volume 1 of *Public Policy and Aboriginal Peoples 1965-1992*, entitled "Soliloquy and Dialogue" available in RCAP, *For Seven Generations: an Information Legacy of the Royal Commission on Aboriginal Peoples*, CD-Rom Published by Libraxus Inc.: 1997.

situations with a special focus on the legal actions taken by First Nations to have their rights recognized and respected, and the FNGI and the way it crystallizes the discourse of self-determination against itself.

3.1. Self-determination – legal definitions and theories

Self-determination is a difficult term to define precisely and definitively. Moreover, both theoretical approaches of the term and practical applications of the principle have evolved greatly through history. Robert McCorquodale explains the historical flexibility of the term as follows:

“Self-determination” is an evolving term that has taken on different forms and hues over time. This evolution has been shaped by diverse factors – states and the ideology of the major world powers, but also by the claimants and the conflicts arising from such claims. This evolution is also visible in international law and in international organizations – where the definitions and applications of the concept of self-determination are continuously repeated, reinterpreted and reshaped according the contemporary situations and trends in the world order.¹⁰

3.1.1. *Self-determination in international law*

The concept of self-determination was formulated and used in international law for the first time at the end of the First World War, when Central and Eastern Europe were remapped after the defeat of the three significant European empires, namely, the German empire and, more importantly for the present concerns, the Austro-Hungarian and the Ottoman empires. American President Woodrow Wilson developed his fourteen points to re-establish peace in Europe, including self-determination. On this matter, he declared that:

[P]eoples may now be dominated and governed only by their own consent. ‘Self-determination’ is not a mere phrase. It is an imperative principle in action, which statesmen will henceforth ignore at their peril.¹¹

During this period, communist ideology and leaders were also deploying the rhetoric of self-determination and defending the corresponding right (at least in appearance) in name of Marxist precepts of class liberation.¹²

¹⁰ McCorquodale, xix.

¹¹ W. Wilson, “War aims of Germany and Austria,” in *The Public Papers of Woodrow Wilson: War and Peace*, eds. R. Baker and W. Dodd (New York: Harper, 1927), 177 quoted in R. McCorquodale, xiii.

¹² Anaya, 76.

A second phase in the use of self-determination at the international level developed after the Second World War. Firstly, the principle of self-determination is mentioned in the United Nations (UN) Charter, Article 1, paragraph 2 (and also in article 55):

1.2. The Purposes of the United Nations are ... [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.¹³

The mention of self-determination remains brief and inexplicit but the following decades demonstrate an extensive application of the principle in the context of the African and Asian decolonisation. The beneficiaries of the principle are not Central Europeans anymore but Africans and South-East Asians. Self-determination thus became a legal justification for decolonisation.¹⁴ On 14 December 1960, the General Assembly of the United Nations adopted the Declaration on the Granting of Independence to Colonial Countries, whose Article 2 reads: “[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁵ More significantly, the principle of self-determination is also enunciated in 1966 in the International Covenant on Economic, Social, and Cultural Rights¹⁶ and in the International Covenant on Civil and Political Rights¹⁷. The self-determination provision common to the international human rights covenants reads: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁸ Self-determination is also affirmed, in similar terms, in U.N.-sponsored international instruments,¹⁹ notably in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations²⁰ in 1971. The principle of self-determination has also been

¹³ Text of the Charter available at < <http://www.un.org/aboutun/charter/> >.

¹⁴ Cf. Hurst Hannum, “Rethinking Self-Determination,” *Virginia Journal of International Law*, 34 (1993), 1-69, reproduced in R. McCorquodale, 195-266.

¹⁵ *International Covenant on Economic, Social, and Cultural Rights*, Dec. 16, 1966, G.A. Res. 2200 (XXI), art. 1(1), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

¹⁶ *Ibid.*

¹⁷ *International Covenant on Civil and Political Rights*, Dec. 16, 1966, G.A. Res. 2200 (XXI), art. 1(1), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

¹⁸ Anaya, 89.

¹⁹ Among other, two other fundamental international documents re-affirm this rights: the *African Charter on Human and Peoples' Rights*, June 27, 1981, *Organization of African Unity*, art. 20, 21 I.L.M. 59 (1981) (entered into force Oct. 21, 1986) and the Helsinki Final Act: *Final Act of the Conference on Security and Cooperation in Europe (Helsinki)*, Aug. 1, 1975, principle 8, 14 I.L.M. 1292 (1975).

²⁰ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, Oct. 24, 1970, U.N. GAOR, 25th session, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971).

specified further and applied to concrete situations by the International Court of Justice.²¹ The most significant court case on this matter remains the *Western Sahara Opinion* in 1975.²² The Court affirmed at that occasion the right of the Western Sahara population to determine its political future (and thus its inclusion in Morocco) by their own freely expressed will – which presupposes “informed and democratic processes, impartially conducted and based on universal adult suffrage.”²³

Post World War Two, particularly the contemporary post-Cold War period, has been marked by a remoralization of international law and a new revitalization of human rights as a concern and a subject of international law. Self-determination has become increasingly associated with human rights during the last decades. This new but developing trend associating collective rights – including self-determination – to democratic rights and human rights is of utmost significance for Indigenous peoples claims and political aspirations. S. James Anaya notes on this issue:

Extending from core values of human freedom and equality, expressly associated with peoples instead of states, and affirmed in a number of international human rights movement, the principle of self-determination arises within international law’s human rights frame and hence benefits human beings as human beings and not sovereign entities as such. Like all human rights norms, moreover, self-determination is presumptively universal in scope and thus must be assumed to benefit all segments of humanity.²⁴

Self-determination, particularly when concerning Indigenous peoples, thus should be considered in the context of the developing international concern for human rights. However, in contrast with most other human rights that are formulated as individual rights (referring to the person/the human being), the right of self-determination applies to “Peoples” and thus shall be considered as a group or collective right. This latter approach allows for a more flexible and open approach towards self-determination, where the application of the principle becomes detached from the historical contexts of old European and colonial empires. Similarly, in these terms, self-determination grows away from the idea of secession and could now be sought and obtained through new political means and institutions. Such a redirection would greatly benefit Indigenous populations who suffer from geographical scattering and cannot usually defend any realistic case for secession. Moreover, except for the most radical groups, secession is not an option sought. Most Aboriginal groups, especially in Western democratic countries, seek to ensure their inclusion within the broader polity and political entity. Their claims for self-

²¹ Among them: *Barcelona Traction Co. Case* (Second Phase) I.C.J. Rep. 3 at 311-3 (1970) and *Namibia Opinion* I.C.J. Rep. 3 at 31 (1971).

²² *Western Sahara Opinion* I.C.J. Rep. 12 at 33 (1975).

²³ *idem*.

²⁴ Anaya, 76.

determination are internal and do not threaten the territorial integrity of the colonizing state. The application of self-determination to Indigenous peoples and its treatment in international law will be detailed further in the following paragraphs.

3.1.2. Self-determination and Indigenous peoples:

The history of Indigenous issues in international law is fairly recent and the history of Indigenous representation within the international bodies is even more contemporary. Although the International Labour Organization (ILO) is devoted to “Indigenous, tribal and semi-tribal populations” as early as 1957 in its Convention 107, concern for Indigenous peoples and their rights is a recent phenomenon in international law and for western democratic polities in general. Similarly, Indigenous problems and rights have been a growing concern for the United Nations only during the last decades. The main starting point for the United Nations’ work on Indigenous populations and issues is the 1970s. In 1971, studies on discrimination experienced by Indigenous peoples throughout the world were undertaken by the Sub-Commission for the Protection of Minorities, under the direction of José Martínez Cobo whose corresponding report was published in 1982. This report contributed in highlighting the difficulties experienced by Indigenous peoples in the world and the need for the United Nations to deal with these problems. In 1982, the Working Group on Indigenous Peoples (WGIP) was created with two broad and ambitious missions. First, the group was in charge of “monitoring and reporting the developments affecting Indigenous peoples”, which is the descriptive and analytical part of the group’s work. Second, the group was asked, in a more prescriptive manner, to formulate a set of standards that could guide Indigenous/state relations.²⁵ The group meets every year, for one or two weeks. This working group is composed of experts from diverse parts of the globe. Because it is comprised of experts and not of state representatives, the Working Group has taken progressive views on Indigenous issues. The creation and work of the WGIP can also be related to two other initiatives launched by the United Nations: the Working Group on the Draft Declaration on the Rights of Indigenous Peoples (DDRIP) (which includes state representatives) and the Working Group on the Establishment of a Permanent Forum for Indigenous Peoples. These three initiatives led to

²⁵ Maivan Clech Lãm, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Ardsley, N.Y.: Transnational Publishers, 2000). For a good overview of the work and position of the United Nations Human Rights Commission on the right of Indigenous peoples to self-determination, see: Erica-Irene A. Dacs (Chairperson and Special Rapporteur of the U.N. WGIP), “Some Considerations on the Right of Indigenous Peoples to Self-Determination,” *Transnational Law and Contemporary Problems*, 3, 1 (1993).

regular workshops and the completion of the Draft Declaration in 1994. Regarding self-determination, the Draft Declaration reads, in articles 3 and 31:

3. Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

31. Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.²⁶

The Draft Declaration is the most progressive international text in terms of Indigenous rights and self-determination. However, this text is still only a draft. It remains a hopeful illustration of the initiatives taken to advance Indigenous rights today as well as an attempt for Indigenous groups themselves to articulate appropriate self-definitions and normative aspirations.

The most debated issues by the Working Group on the Draft Declaration has been the question of “self-determination” and in particular, whether or not Indigenous peoples are entitled to the right of “self-determination” and, if yes, what kind of political rights this entails. The group has taken a contextual rather than positivist approach. Consequently, the key criteria used to determine the legitimacy of an Indigenous people’s claim to self-determination is their situation within the existing state. From this perspective, the defence of Indigenous self-determination is related to the protection of minorities – an historical concern within the international community and one more clearly established in jurisprudence. Finally, one of the most helpful effects of these Working Groups (WGIP and WGDDRIP) for the Indigenous populations of the world has been the opening of a forum for discussions and the reporting of abuses and discriminatory situations; it has also helped Indigenous groups to formulate their case in Western terms and thus reverse the oppressive structures of Western colonial societies against themselves. International law was one of these structures, used to justify the colonization and even the destruction of Indigenous peoples – not only the political destruction of their nationhood and sovereignty but also the direct and indirect physical destruction of the populations. Currently, international law opens new pathways of reparation and renewal:

Indigenous peoples now contest their dislocations in common international fora where, by degrees, they develop overlapping strategies, alliance and finally, *vocabulary*. Indeed, it can be said that a world-wide culture of indigenous people’s resistance is emerging and growing.²⁷

²⁶ *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994). The text is reprinted in Appendix B *infra*.

²⁷ Lâm, 48. Emphasis is my own.

The WGIP had also allowed an increased flexibility and openness of the procedures, a phenomenon rare in international organizations. The representation system in the diverse bodies of the United Nations is indeed a state system – which grants primacy in the discussion to state representatives. Although they were not allowed to vote in the later proceeding of the WGDDRIP, Indigenous participants and non-governmental organizations were authorized to intervene, state their position and participate in the discussions.

Many authors, M. C. L  m quoted earlier but also S. James Anaya, have tried to explain and combine these different developments into a consistent theory. A lot of work is still to be done. This trend in international law remains recent and it would require more numerous and specific decisions from the International Court of Justice to start building a true body of international law, that would define “Indigenous peoples”, their rights, and their entitlement to self-determination. Currently, international law, as many other domains, remains erratic and does not yet provide an established framework regarding the application of the principles of self-determination to Indigenous peoples. The following sections will look at these limitations in detail and explain how they affect the discourse of self-determination in Canada – particularly when facing the well established and politically fashionable principles of good governance proposed by the federal government.

3.1.3. Difficulties

Self-determination is one of the most contentious ideas in the international community. There is debate about nearly every aspect of self-determination, from its definition and exercise to its philosophical basis and status. ... One reason why self-determination is so contentious in international law is that the concept challenges some of the core principles of the international legal system. It challenges the sovereignty of states and their territorial integrity, it interferes with matters within the domestic jurisdiction of states and makes applications of treaties uncertain.²⁸

These concerns about and difficulties surrounding the concept of self-determination are particularly salient when trying to apply the concept to Indigenous peoples. The complexity is exacerbated by two factors: an uncertain concept of self-determination, and the blurred and uneasy category of Indigenous peoples. This uncertainty produces confusion, fear and emotional responses, but also hope and disillusionment. In this section, I present and explain the difficulties with the concept of self-determination itself and with its application to Indigenous peoples. These difficulties can be grouped under two sets of questions:

²⁸ McCorquodale, xi.

- (a) How should self-determination be defined? How should 'peoples' eligible to the principles of self-determination be defined? What constitutes a 'people'?
- (b) For what type of self-determination are Indigenous peoples eligible? Does the right of self-determination allow them to request secession? If not, how can the limited character of "self-determination" not jeopardize its true meaning and lessen its significance for Indigenous peoples?

(a) *Problems of definition*

The term "self-determination" is itself confusing: it connotes contradictions and evolves irregularly in international legal theory. It is situated at the intersection of many other complex and yet fundamental issues: individual versus collective rights, territorial integrity versus respect of diversity, international governance versus national authority. It constitutes, from this perspective, a dangerous edge in international law. Some authors²⁹ even argue that the concept of self-determination is too much of a "complex social phenomenon" to become an international legal rule.³⁰ In 1956, Ivor Jennings noted the inherent difficulty in defining definitively "self-determination":

[N]early forty years ago, a professor of Political Science, who was also President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of self-determination. On the surface, it seemed reasonable: let the people decide. It was in fact ridiculous, because the people cannot decide until someone decides who are the people.³¹

This criticism could be interpreted cynically and initially discarded but, it rightfully pinpoints one of and possibly the major difficulties with the concept of self-determination. Robert McCorquodale also writes about the "the lack of definition – in particular who is the self who will determine."³² Thus, for example, the conservation of colonial boundaries by the newly independent African states remains a controversial issue whose consequences are still to be felt.

Although the International Court of Justice and the United Nations do not take such a pessimistic view of self-determination, these intrinsic difficulties are particularly and painfully relevant to the case of Indigenous peoples. No definitive definition of "Indigenous peoples"

²⁹ Cf. P. Allot, "Self-Determination – Absolute Right and Social Poetry?" in *Modern Law of Self-Determination*, ed. C. Tomuschat (Dordrecht: M. Nijhoff, 1993) and T. Frank, "Legitimacy in the International System," *American Journal of International Law*, 705 (1988) 743-749.

³⁰ McCorquodale, xii.

³¹ I. Jennings, *The Approach to Self-Government* (Cambridge: Cambridge University Press, 1956), 55-6 quoted in McCorquodale, xiv.

³² McCorquodale, xiv.

currently exists, instead, in this new topic of international law, only working definitions are used.

11. The Working Group has used, and should continue to use, the Cobo working definition for "indigenous peoples". The Cobo formula and ILO Convention No. 169 concerning Indigenous and Tribal Peoples (1989) definition both acknowledge self-identification and self-recognition as essential aspects in defining indigenous peoples.³³

The term "peoples" is contentious, as the recent evolutions in international law and the wording of contemporary texts of the ILO or the UN illustrate. In 1989, the ILO Convention 107 was replaced by Convention 169 and the phrase "Indigenous populations" became officially "Indigenous peoples." This change in vocabulary suggests that Indigenous peoples are now granted the rights of peoples in international law, including the right to self-determination. Nevertheless, the convention noted in one of its articles (article 1.3) that the text did not recognize the right of self-determination.³⁴ Not only is the term "people(s)", in contrast to populations/communities, considered controversial but, arguments over rhetoric are even more detailed, including a debate over the words "people" versus "peoples". If "people" is used in its singular form, it only refers to a group of individuals – an abstract group that does not carry any specific rights. "Indigenous people" becomes a neutral category, a function of the ethnicity of the persons. In contrast, if "peoples" is used in its plural form – then every "people" included is regarded as a meaningful group – a community (as a nation even – some would argue) eligible for the international rights of peoples. This is the position chosen by the Working Group: they speak of "Indigenous peoples" in the fullest meaning of the term. Nevertheless, this issue is continually raised during the debates, particularly by the state representatives. And, so far, the term "peoples" tends to be interpreted very restrictively in international law and within the diverse international organizations. The following question remains unsettled: "are indigenous peoples truly Peoples in the international legal understanding?" However, this lack of fixed and precise definition of "peoples" in international law should not to be regretted. The Working Group on the Draft Declaration notes when considering the appropriateness of a definition of "Indigenous Peoples":

³³ Extracts from a document entitled "A definition of "indigenous peoples"?" (Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations, Fourteenth session, 29 July-2 August 1996, Item 4 of the provisional agenda) E/CN.4/Sub.2/AC.4/1996/2/Add.1 (10 June 1996). For the diverse working definitions that have been used in the United Nations bodies and International Labour Organization, see *infra* Appendix C.

³⁴ Article 1. par. 3 reads: "The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." Convention (No. 169) Convention concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labour Conference, (entered into force Sept. 5, 1991).

2. Deciding upon an unequivocal definition of "indigenous peoples" as a prerequisite for advancing the work of the Working Group on Indigenous Populations on the draft declaration is unnecessary. Nor should the present lack of a watertight definition be an impediment to the establishment and operation of a permanent forum. As indicated at the first session of the working group of the Commission on Human Rights held in Geneva in November/December 1995, and elsewhere:

Central concepts in international human rights instruments are often not defined;

The United Nations generally refrains from attempting tight definitions, which may limit the flexibility of Governments and peoples in applying relevant instruments to their own national circumstances (...)

3. Early settlement of definitional terms may well exclude significant groups from enjoyment of such rights as may be accepted in the draft declaration. Clearly there is no need to reach a precipitate determination of the meaning of "indigenous peoples" in an abstract definition.³⁵

Similarly, Robert McCorquodale reminds us that it is certainly not the task of international authorities to define who is the "self" in the expression "self-determination".

In these circumstances, to expect international law to provide a single clear, objective and multipurpose definition of 'self' is misguided and misunderstands the role of international law. International law is a process in which political, social, economic and cultural issues are debated and sifted. This process often requires significant degrees of openness in language, drafting and interpretation. It is a process dominated by states. Any clarification of self-determination, including its definition and forms of exercise, must be seen in this context.³⁶

(b) exercise of self-determination

The restrictive definition of "peoples" in international law is linked to a secessionist understanding of the right of self-determination. Indeed, for a state to recognize one of its member groups as "peoples" has huge destabilizing and fragmentizing potential. It triggers a series of rights that the group can now use against the state, with the threat of secession at the horizon. We thus confront the classical and ongoing tension between self-determination and territorial integrity. Territorial integrity is a strong, clear, and well established concept of international law. The Declaration on Friendly Relations of 1970 notes, for instance, that "[self-determination shall not] be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity of political unity of sovereign and independent States."³⁷ Any understanding of self-determination in secessionist terms is thus likely to fail in contemporary societies and in turn, this threatening aspect of self-determination

³⁵ "A definition of 'indigenous peoples'?", cf. *supra* Note 34.

³⁶ McCorquodale, xvii.

³⁷ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, Oct 24, 1970, U.N. GAOR, 25th Session, Supp. No28, at 121, U.N. Doc. A/8028 (1971), Principle V.

is commonly used by its opponents to deadlock the corresponding claims.³⁸ Indeed, this conception of self-determination is very widespread on the international scene – most of the state representatives and most of the traditional actors fear the implications that self-determination can have on their own territorial integrity, economic viability and general stability. The settler states use this general suspicion of self-determination to justify their recalcitrance to affirm further Indigenous rights and ‘nationhood’, including recognition of sovereignty and inherent rights and indeed right to self-determination. Instead, and this is especially the case in Canada, governments prefer *ad hoc* arrangements promoting local and limited self-governance that do not question constitutional or international law³⁹. This is the good governance stance chosen by the Canadian government. This approach is well illustrated by the attitude of Canadian representatives on the international scene:

At the final conference at which convention 169 was adopted, Canada, acting in concert with other states, tried but failed to have a disclaimer added which would have explicitly refused the right of self-determination to indigenous peoples.⁴⁰

Subsequently, during the 1993 International Human Rights Conference in Vienna, the Canadian government mitigated its position by stating that:

Where an indigenous people meets the existing international law criteria, it is entitled to assert the right. Assuming, however, that not all indigenous peoples meet those criteria, Canada preferred a self-determination clause that would cover the situation of all indigenous peoples.⁴¹

Therefore, Canada and some other states, but particularly Sweden and New-Zealand accept the principle of self-determination in theory but protect themselves by implying that the contemporary situation of its Aboriginal populations does not satisfy the requirements for this right to be implemented. Self-determination is thus not accepted in practice – especially on its own lands. This equivocal position is once again illustrative of the refusal of the Canadian government to consider Aboriginal rights permanent and positive. Instead, the government persists in interpreting Aboriginal rights to render them consonant with its own variable interests. In 1996 again, the Canadian representatives reaffirmed their “readiness to recognize

³⁸ S. James Anaya explains for instance in his analysis of self-determination: “the resistance toward acknowledging self-determination as implying a right for literally all peoples is founded on the misconception that self-determination in its fullest sense means a right of independent statehood”, page 80.

³⁹ “The Government of Canada recognizes the inherent right of self-government as an existing right within section 35 of the *Constitution Act, 1982*. It has developed an approach to implementation that focuses on reaching practical and workable agreements on how self-government will be exercised, rather than trying to define it in abstract terms. The Government believes that this approach is flexible and will allow all interested parties to make meaningful progress in the realization of Aboriginal self-government.” extract from Canada: Dept. of Indian Affairs and Northern Development. *Aboriginal Self-Government: Federal Policy Guide*. Ottawa. 1995. “The government of Canada's approach to Implementation of the inherent right and the negotiation of aboriginal self-government.”

⁴⁰ Lám, 45.

⁴¹ *Ibid.*, 169.

the self-determination of Indigenous peoples provided that the integrity of democratic states remained inviolate.”⁴² Overall, Canada remained opposed to the text – and formed in 1996 with the New-Zealand and USA representatives a CANZUS group that “stood up in decided opposition to much of the text”⁴³.

Finally, current work and research around the rights of Indigenous peoples is particularly important for the modernization of international law and the renewal of the traditional nation-state models. The right of self-determination for Indigenous peoples occupies an uneasy position between secession threats and the conservative argument of territorial integrity. This tension is crucial in contemporary international legal theory. For self-determination to evolve as a meaningful, flexible and adaptive democratic right, this tension has to be negated. In other words, “the resolution of the tension between territorial integrity and self-determination – in terms of their competing claims on sovereignty – is crucial for the future impact of self-determination on international law.”⁴⁴

3.2. Variations around self-determination

In the section that the RCAP devotes to “the relationships between the principles of self-determination and self-government”, the authors write:

The right of self-determination is vested in all the Aboriginal peoples of Canada, including First Nations, Inuit and Métis. It is founded in emerging norms of international law and basic principles of public morality. Self-determination entitles Aboriginal peoples to negotiate the terms of their relationship with Canada and to establish governmental structures that they consider appropriate for their needs.⁴⁵

Within Canadian Aboriginal politics, the vocabularies of self-determination and self-government are strongly related and intermixed. The conceptual confusion between self-determination and self-government makes it difficult for the analyst as well as for the informed citizen to know what the actors actually mean by the term “self-government”, which has itself recently been reformulated by some as “self-governance”. Self-government suffers, as much as and perhaps more than self-determination from conceptual equivocation and confusion. It became a fashionable term during previous decades and every actor involved in contemporary

⁴² *Ibid.*, 72.

⁴³ *Ibid.*, 73.

⁴⁴ McCorquodale, xviii.

⁴⁵ RCAP, *For Seven Generations: an Information Legacy of the Royal Commission on Aboriginal Peoples*, CD-Rom Published by Libraxus Inc.: 1997, Volume 2, section 3.2.1.

Aboriginal issues seems to feel obliged to use and overuse this term: this is especially true of political leaders, academics, and government officials. In the general population, both Aboriginal and non-Aboriginal, the term is also widely used, carrying hopes and aspirations of justice and redress for some, but fears for others. Although the widespread usage of the term “self-government” remains a positive sign, confirming the new visibility of Aboriginal issues and claims as well as the increasing inclusion of Aboriginal voices in the public debate, the concept itself remains often unclear and carries quite different denotations according to its enunciator.

What is of interest in this section of the paper is not the use of the term “self-government” to describe practical and local arrangements, where powers have been delegated by the central authority or decentralized – often called delegated self-governance. This version of self-government seems to be the one proposed by the Government of Canada and already implemented in a few modern agreements.⁴⁶ Instead, the concept of self-government that is of interest here is its intellectual and legal component which focuses on what it means to be self-governed as a community and as an individual through self-determination, rather than delegation. In this respect, the discussion of self-government is rooted in a discussion of self-determination. Self-government becomes at least the political component of self-determination and at most the collective expression of self-determination. As noted by M. Murphy in his article entitled “Culture and the Courts: A new direction in Canadian Jurisprudence on Aboriginal Rights”, the right of self-government is to be included in encompassing “Aboriginal Right” and refers to: “... the right of Aboriginal Peoples to be recognized as autonomous political communities with the authority and resources to decide the course of their individual and collective futures.”⁴⁷ “Inherent rights”, and “self-government”, like “self-determination”, assume fundamental implications in terms of normative values and human rights.

In Canada, the discourse of self-determination, whose importance in the international arena was described earlier, takes the expression of an intransigent defence of Aboriginal and treaty rights, sovereignty and the right to self-government. It is formulated and defended within two main frameworks: the judicial system and the political system. The two systems will be studied separately for the sake of clear analysis but a fundamental relationship exists between these two realms. These connections have become particularly visible in recent decades. The government legislation is challenged in courts while the inclusion of Aboriginal rights in the Constitution

⁴⁶ For instance: in 1999, the Nisga'a Final Agreement and the Sechelt Agreement in Principle, in 1993 The James Bay And Northern Quebec Agreement And The North-eastern Quebec Agreement.

⁴⁷ Michael Murphy, “Culture and the Courts: a New Direction in Canadian Jurisprudence on Aboriginal Right,” *Canadian Journal of Political Science*, 34, 1 (March 2001), 109.

influences not only constitutional law but also general jurisprudence. The First Nations Governance Initiative for instance responds in part to the Supreme Court decision in *Corbière* (1999), in which the Supreme Court of Canada found that the “ordinarily resident” requirement was found to violate the Canadian Charter of Rights and Freedoms, on the grounds that it discriminated against off-reserve band members. M. Murphy also notes “the implicit connection between legal recognition and government negotiation of Aboriginal rights later became an explicit and integral aspect of Court judgements in the 1990s.”⁴⁸ The following paragraphs provide an overview of the recent developments in both the judicial and political systems and explain why the two systems are particularly interdependent when dealing with Aboriginal rights and self-government.

3.2.1. *Courts and the justice system*

The concern of Canadian courts for Aboriginal issues, and especially rulings in favour of Aboriginal claimants, is a relatively recent phenomenon. This concern also exists in other Anglo-Saxon settler societies. The *Calder* decision (1973) is usually considered as a turning point on these matters. In this case, “the appellants, officers of the Nishga⁴⁹ Indian Tribal Council (...) brought an action against the Attorney General of British Columbia for a declaration that the aboriginal or Indian title to certain lands had never been lawfully extinguished”. The opinions of the Supreme Court justices were split. However, “all of the justices (except Pigeon, who did not express an opinion on that matter) believed that Aboriginal title existed in law”; the residual question focused on the extinguishment of the title. Finally:

In spite of the fact that the Nishga⁴⁹ lost the case, the *Calder* decision was seen by many as a major victory in the struggle for Aboriginal title. Six Supreme Court Justices had agreed that Aboriginal title existed in law, and, where it was not extinguished, continued to have force. A persuasive defense of the concept of Aboriginal title, including a powerful argument that title could not be extinguished unless the Sovereign showed a clear and plain intent to do so, was recorded in Hall’s dissenting opinion; these are views which were eventually adopted by the Supreme Court (see *Sparrow*).⁵⁰

The influence of the court decisions in triggering political action is also clear here: negotiations over comprehensive land claims were launched by the government after this case and today, the

⁴⁸ *Ibid.*, 118.

⁴⁹ also spelled Nisga’a.

⁵⁰ Peter Kulchyski, *Unjust Relations Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994), 62.

Nisga'a nations are the beneficiary of one of the rare self-government agreements in Canada.⁵¹ Similarly, more recent decisions such as the *Delgamuuk'e* decision (1997)⁵² correspond to important victories for Aboriginal communities in terms of land rights and reveal a new sensitivity and a more progressive approach from the courts with respect to Aboriginal claims and rights. Recent Canadian decisions are to be re-contextualized in a broader context that resulted in the challenging of land rights and automatic Crown ownership in other places within the Commonwealth. Relevant here in particular is the *Mabo* decision (1992)⁵³ that overthrew two centuries of *Terra Nullius* jurisprudence on the Australian lands. This does not imply in any case that the Aboriginal appeal on legal instruments is a new phenomenon. It has existed since colonization and developed impressively in the 1960s and 1970s following the American Civil Rights movement. In the Australian case, a similar and maybe stronger land rights claim (against a mining company) was taken to the Supreme Court in 1971 by some Arnhem Land Aboriginal communities. The claim, however, was unsuccessful: the doctrine of *Terra Nullius* was once again reaffirmed. The legal situation in the United States is relatively different as land ownership and the sovereignty of the Indian Tribes were fixed for a long time in the historic Marshall decision⁵⁴ as "domestic nations" with self-governance rights. The Marshall decision is the most significant court decision in terms of Aboriginal rights in the Anglo-Saxon world. Not only has it had a significant impact on the relationships between Indian populations and American institutions, but it has also represented and still represents the significant opportunities Indigenous populations have in terms of recognition of their inherent sovereignty and thus self-determination and self-government. The Marshall decision was referred to in significant Canadian cases such as the *Calder* and *Sparrow* decisions. The Marshall decision was also a decisive argument in the landmark Australian Supreme Court's decision in the *Mabo* case.

However, what is relevant for this thesis is less the outcome of the court cases than the arguments heard in these court cases. Aboriginal communities and appellants provide a valuable illustration of the discourse of "self-determination" when defending their case in front of Western courts. In the same manner that Indigenous peoples are using Western legal instruments on the international scene to have their rights acknowledged and respected, or claim compensation, Aboriginal Peoples have been using domestic courts and Supreme Courts in the United States, Canada, New Zealand, and Australia for identical purposes.

⁵¹ *Nisga'a Final Agreement*, signed by the Government of Canada on May 4, 1999. Background information and official texts available at <http://www.ainc-inac.gc.ca/pr/agr/nsnga/index_e.html>.

⁵² *Delgamuuk'w v. British Columbia*, 1997 3 S.C.R. 1010.

⁵³ *Mabo v. Queensland*, 1992 175 C.L.R. 1.

⁵⁴ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The appeal of Aboriginal communities to higher legal authorities is not a recent phenomenon. The Nisga'a for instance have submitted their claims to British and Canadian authorities repeatedly since colonization. I discussed previously their claim in the *Calder* case, which was appealed to the Supreme Court. As noted in the final decision of this case:

The Nishga answer to Government assertions of absolute ownership within their boundaries was made as early as 1888 before the first Royal Commission to visit the Nass Valley. Their spokesman (David Mackay) said: "What we don't like about the Government is their saying this: 'We will give you this much land'. How can they give it when it is our own? ...".⁵⁵

This strong position of the Nisga'a with respect to their land rights was frequently repeated on many occasions, to diverse political and judicial authorities and to Royal Commissions:

Official resistance to the existence of Aboriginal title did not occur without Aboriginal protests. As we will see in our discussion of claims policy, Aboriginal peoples made consistent demands for recognition of their rights to lands and resources and sought to enter into treaties that would protect their systems of land tenure and governance from encroachment and erosion. In 1913, for example, the Nisga'a Nation sent a petition to authorities in London seeking the protection of Nisga'a title.⁵⁶

In 1990, in the Sparrow case, Mr. Sparrow was charged under section 61(1) of the Fisheries Act with fishing with a net longer than permitted by licence. The defence argued that "[A]boriginal rights", including fishing rights, were to be understood as part of a continuing rights enjoyed by the Aboriginal groups in question, as "organized societies" that existed prior to settlement. Although not considered directly by the court, the arguments used by the defence can easily be interpreted as softer version of the "inherent and continuing sovereignty argument". In *R. v. Pamajewon*,⁵⁷ self-government was tackled more directly: Shawanaga and Eagle Lake First Nations claimed that they had a right of self-government over their reserves including the right to regulate high-stakes gambling.

The *Pamajewon* decision nonetheless left the door open for Aboriginal peoples to prove a right to self-government over activities that were integral to their distinctive cultures, if they could also establish that they had regulated those activities prior to European contact.⁵⁸

The court found that self-government shall be treated as other Aboriginal rights. The case has been criticized "for taking a narrow, fragmented approach to Aboriginal self-government."⁵⁹

Instead of attempting to prove a right to self-government directly, Aboriginal peoples may have more success establishing other Aboriginal rights first, and then asserting that a right of self-government is entailed by the communal nature of those rights.⁶⁰

⁵⁵ *Calder v. AG for British Columbia*, 1973 S.C.R. 313, reproduced in part in Kulchyski, 64.

Both terms Nisga'a and Nishga are representing the same Aboriginal groups.

⁵⁶ RCAP, Volume 3, Section I.1.

⁵⁷ *R. v. Pamajewon*, 1996 4 C.N.L.R.

⁵⁸ McNeil, 327.

⁵⁹ McNeil, 327.

⁶⁰ *Ibid.*

This fragmented approach taken by the Courts is not, however, the approach claimed and defended by the Aboriginal actors and claimants. For instance, in the *Delgamuukw* decision,⁶¹ the Gitksan and Wet'suwet'en nations in north western British Columbia were claiming ownership *and jurisdiction* over their traditional territories. Although the decision was a frank advancement in terms of native title to land, the Court declined to consider the claim to self-government.

The foregoing cases reveal that the Supreme Court of Canada tends to have a fragmented approach towards Aboriginal rights, because each right is considered separately, particularly in light of cultural specificity. Instead, the appellants in all these cases defended a holistic version of their rights rooted in the continuous existence of their peoples as sovereign and self-determined nations. Their claims to land rights are often accompanied by a claim to self-government. However, the courts continue to refuse to confront self-government and call on negotiations with the federal government to settle these issues. An important part of filling in the content of section 35 of the Constitution is thus left to political processes.

3.2.2. *Constitutional law and reform*

In 1982, Aboriginal rights were entrenched in the *Constitution* under section 35 which reads:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Metis peoples of Canada.
- (3) For greater certainty, in Subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this act, the aboriginal and treaty rights referred to in Subsection (1) are guaranteed equally to male and female persons.⁶²

It is now recognized among academics, constitutional lawyers, and government officials that section 35 of the Constitution "constitutionalizes an inherent right of Aboriginal self-government", but this remains a marginal advancement of Aboriginal rights, because there is no agreement either on an official and entrenched definition of the precise nature and scope of this right or on its relation to the other existing orders of government in Canada.⁶³ However, the demonstrations and the pressure orchestrated by Aboriginal leaders and First Nations members on the Canadian government to participate in the constitutional discussions after the

⁶¹ *Delgamuukw v. British Columbia*, 1997 3 S.C.R. 1010

⁶² Constitutional documents available at <laws.justice.gc.ca/en/const/>

⁶³ Murphy, 118.

repatriation of the Constitution and the discussions surrounding the Charlottetown Accord are also relevant illustrations of the logic, arguments, and rhetoric used by the Aboriginal actors to have their claims heard and their rights acknowledged. With the introduction of section 35 of the Constitution,

the intention was to identify and define Aboriginal rights by political means and possibly, by further constitutional amendment. But even though four constitutional conferences were held in the 1980s to accomplish this task, the talks foundered over the issue of Aboriginal self-government. As a result, identification and definition of Aboriginal rights were relegated to the legal forum of the courts by default.⁶⁴

Although the Charlottetown Accord was defeated by referendum and although many Aboriginal persons were opposed to this agreement,⁶⁵ the consequences remain crucial in the evolution of Aboriginal politics in Canada. The inclusion of Aboriginal actors and organizations in Canadian political processes has been unprecedented:

The failure of the Accord to achieve constitutional status has tended to overshadow the achievements made by Aboriginal Peoples in the process of constitutional reform and the implications those gains hold for the future of Aboriginal Peoples within the dynamics of Canadian federalism.⁶⁶

Bold and Chiste identify three important effects of the Charlottetown Accord, felt despite the failure of the agreement: first, "the establishment of a new baseline for future demands by Aboriginal leaders at both the constitutional and legislative policy levels ... [second,] the influence of the accord on the later recommendations of the RCAP, ... and [third] an indicator of how far both the federal and provincial governments are capable of moving in their thinking about the place of aboriginal governments within the federal system."⁶⁷ Three other positive effects can be identified: unity, participation and recognition. Unity is significant because the Aboriginal organizations in Canada found themselves acting as an homogeneous pressure group in order to be included in the constitutional processes and have their voices heard.⁶⁸ Participation is important because indeed they have been successful in being included in the constitutional discussions. Recognition is also important because the Aboriginal cause and activist gained both in media visibility and public legitimacy.

⁶⁴ McNeil, 318.

⁶⁵ "While negotiated and strongly endorsed by the leadership of the AFN, the agreement was vehemently denounced by a number of native women's association and by many chiefs and band councils whose reserve communities have treaty relationships with the Canadian government. In the end, nearly two-thirds of the residents voting on these reserves rejected the Accord." J. Anthony Long and Katherine Beaty Chiste, "Aboriginal Policy and Politics: The Charlottetown Accord and Beyond," 154.

⁶⁶ Long & Chiste, 154.

⁶⁷ *Ibid.*, 156.

⁶⁸ With the exceptions of more radical groups that defend an intransigent view of their sovereignty and refuse their inclusion in the political entity of Canada.

3.3. The discourse of self-determination against the FNGI

The opposition to the FNGI is consciously set in this dialectic intellectual framework identified in this thesis. Although not attacking directly the “discourse of good-governance”, the Aboriginal leaders and the AFN countered the reform project of the government with rhetoric clearly associable with the “discourse of self-determination”. This is evident in a news release from the AFN released on May 28, 2002:

[During] a two-day meeting in Ottawa, May 22-23, (...) the First Nation leaders asserted their right of self-determination, which is guaranteed by international law and the Canadian Constitution. The leaders condemned the so-called First Nations Governance Initiative of the federal government as a unilateral attempt to undermine the inherent right to self-government of First Nations government.⁶⁹

In the opposition to the FNGI the three major routes possible to assert self-determination are also used namely, the courts, the affirmation of constitutional rights, and the will to truly participate in the legislative process. The content of the arguments against the FNGI is truly revealing. These criticisms can be grouped into two interrelated categories. The first category is an opposition to the FNGI, focussing on its flawed process, its unilateral imposition and the lack of participation of the Aboriginal organizations. The second category is an opposition to the type of ‘self-governance’ proposed by the AFN, delegated and often compared to a municipal type of jurisdiction, and considered in perfect contradiction with First Nations rights to self-determination.

3.3.1. *Self-determination against the federal policy*

Minister Nault announced the FNGI project in March 2001. The announcement produced widespread angry reactions from the Aboriginal community. During the spring of 2001, the Aboriginal leadership threatened to respond with physical demonstrations such as road blocks. The removal of the minister was demanded as the discussions were heating up. In a press release on May 1st, Chief Stewart Phillip, President of the Union of British Columbia Indian Chiefs (UBCIC), reacted quite angrily to the FNGI and Minister Nault’s attitude, reminding him of the failure of his predecessor on the same type of *Indian Act* reform:

⁶⁹ AFN, “First Nations Follow Up Ottawa ‘Call To Action’ with Rally in Winnipeg this Thursday.” News Release. Tuesday, May 28, 2002.
<<http://www.afn.ca/Press%20Releases%20&%20Speeches/First%20Nations%20Follow%20Up%20Ottawa%20‘Call%20To%20Action’%20With%20Rally%20In%20Winnipeg%20This%20Thursday.htm>> (Retrieved 14 May 2002).

Bob Nault's consultation process is just another elaborate federal con game to off-load federal responsibilities onto the Bands themselves... Former Minister of Indian Affairs Ron Irwin failed to get support for his draconian package of Indian Act amendments four years ago so predictably the Department of Indian Affairs is taking another run at us.⁷⁰

Many Indian leaders called on their members to boycott the proposed consultation process and to destroy the questionnaires that were being used as part of that process. The two parties finally agreed on a thirty-day cooling-off period in August, but no agreement was reached. Clashes were avoided by a promise of active co-operation with First Nations leadership but the opposition to the reform did not cease. A common working plan was built through collaboration between the AFN and the Department of Indian Affairs and Northern Development (DIAND) but it was refused by the General Assembly of the AFN in December 2001. Since then, the position of Aboriginal leadership has been radicalized in its opposition to the governmental project. In March 2002, a lobbying campaign against the governance initiative was launched by a delegation composed of some Manitoba chiefs on behalf of the AFN. Diverse rallies and demonstrations were organized in May in Winnipeg and Ottawa, for instance.

However, one should not overestimate the unity of Aboriginal reaction. Among the national organizations, some important internal divisions occurred regarding the position to take both on the federal government's consultation process and the reform proposal. The Congress of Aboriginal Peoples and its Chief, Dwight Dorey, as well as the National Aboriginal Women's Association (NAWA), a dissident group of Native Women's Association of Canada (NWAC),⁷¹ had participated in the reform process and had representatives in the Joint Ministerial Advisory Committee in charge of drafting the bill. Overall, however, the Aboriginal leadership continued to display strong opposition and criticism against Minister Nault's project and the way the reform process was led. For instance, as explained by Paul Barnsley in the *Windspeaker* July 2001 issue, "just over 20 per cent of the approximately 900 federally funded Aboriginal organizations in Canada have accepted or will soon accept federal funding to participate in the First Nations governance act initiative."⁷²

The reaction of Grand Chief Matthew Coon Come in 2002 is particularly illustrative of the discourse of "self-governance". A speech given at the occasion of the Conference "Beyond the Indian Act" offers the following insights:

⁷⁰ Don Bain, "Nault's Consultation Process Is Just an Elaborate 'Con Game'," *Canadian Aboriginal News*, 01/05/01.

⁷¹ In November 2001, a dissident group, the National Aboriginal Women's Association (NAWA), split from the Native Women's Association of Canada (NWAC), mainly in reaction to NWAC's decision not to take part in the federal reform process.

⁷² Paul Barnsley, "Two Hundred Organizations Buck AFN Boycott," *Windspeaker*, July 2001, 6-7.

The Royal Commission report warned against tinkering with the Indian Act, and said we have to move beyond the “one-size-fits-all” approach. Tinkering with archaic and outmoded legislation is like trying to fix an old, broken down motor. At some point, you’re better off just leaving it alone – it is not a good investment of time, energy and resources. Let’s build a new one.⁷³

The recurrent references to the RCAP are also indicative that First Nations leadership recognize more opportunities in non-partisan progressive judicial institutions than in governmental and policy processes. Also, First Nations leaders often use the most progressive of the Supreme Court decisions, and their interpretation of section 35, to make their case against the federal and provincial governments. Similarly, some First Nations wish to use courts to fight against the Indian Act reform. The Federation of Saskatchewan Indian Nations, for instance, is planning on suing the government as soon as the reform is implemented. In 2002, they filed a claim to court for anticipatory breach of section 35 of the Constitution. The Union of British Columbia Chiefs (UBCIC) has also been particularly active in opposing the bill and calling on the opposition parties in Parliament and on the Liberal back bench members of Parliament. Finally, the opposition crystallizes around the fact that the reform would be a threat to “self-determination”. In his legal analysis of the First Nations Governance Act, ordered by Aboriginal leadership (AFN and UBCIC) and concerning the potential legal challenges, David Nahwegahbow highlights a potential problem:

The proposed legislation is a vehicle through which the federal government will seek to promote its own narrow view of First Nations self-government. It is totally inconsistent with recognition of inherent rights and the right of self-determination as an emerging norm in international law (Draft Declaration on the Rights of Indigenous Peoples).⁷⁴

3.3.2. Self-determination against delegated governance

In a speech “Beyond the Indian Act”, Matthew Coon Come starts his argument with reference to the section 35 of the Constitution – section 35 is said to be a “starting point in Canadian Law.” The view taken by most Aboriginal actors, and certainly the AFN, is that the rights contained in section 35 are only recognized by the Constitution text. “Section 35 does not give us our rights – section 35 acknowledges that we have those rights, that they are

⁷³ AFN, “Speaking Notes for AFN National Chief Matthew Coon Come at the Conference ‘Beyond the Indian Act’.” April 17, 2002.

<<http://www.afn.ca/Press%20Releases%20&%20Speeches/Speaking%20Points%20for%20AFN%20National%20Chief%20at%20the%20Conference%20“Beyond%20the%20Indian%20Act”.htm>> (Retrieved 7 June 2002).

⁷⁴ AFN, “AFN Briefing on the Governance Initiative: Booklet 3, Legal Analysis,”

<<http://www.afn.ca/Programs/Governance/legalanalysis.html>> (Retrieved 15 February 2003). See also the full legal analysis available at the same internet address.

inherent rights. ... They exist today, and they existed before any settler stepped on our shoes.”⁷⁵ Similarly, the treaties are considered as proof the pre-existence of First Nations as sovereign Nations “with a right to self-determination.” Once again, Grand Chief Matthew Coon Come notes that “treaties” are not the source of the rights, but rather confirmation of them. These rights are pre-existent and the treaties represent their official recognition under the Western legal tradition. Later in the speech, Matthew Coon Come reiterates this view and notes, ironically, concerning the FNGI: “the Minister’s process seems to be based on a view that First Nations’ Governance comes from the good grace of federal legislation”. Similarly, when proposing the AFN’s alternative plan entitled “First Nations Plan”⁷⁶ to the Standing Committee on Aboriginal Affairs, Matthew Coon Come notes:

Section 35 recognizes and affirms our existing inherent and Treaty rights. It does not create those rights or give us any rights – it recognizes that we already have these rights, that they are inherent. The proposed Governance Act seems to be based on a view that First Nations Governance is something that comes from federal legislation. It does not. Section 35 recognizes our right and authority to govern ourselves.⁷⁷

The same views have been repeated using either the same or slightly different wording during the diverse press conferences and interviews where the AFN position is explained and justified. Chief Stewart Phillip, head of the UBCIC, articulated this opposition in the most consistent manner in regard to the self-determination precepts. For instance, Chief Stewart Phillip formed in 2001 a “First Nations Coalition for Inherent Rights”, and on that occasion explained his opposition to the FNGI in the following terms:

Specifically, if Minister Nault rams through the FNG and makes amendments to the Indian Act, our right to self-government will be dangerously eroded. In order to exercise our inherent right to self-determination, we must have true self-government. Such rights are protected by Section 35 of Canada’s Constitution Act, been affirmed in court decisions like *Delgamuuk’w* and international covenants like the Universal Declaration of Human Rights. (...) Such unilateral, government sponsored initiatives only continue to reveal the federal government’s archaic approach to dealing with First Nations of this land. (...) The UBCIC confirms a rights-based approach taken by our national organization, the Assembly of First Nations, is the explicit response needed to the FNG Initiative.⁷⁸

The name of the coalition formed in opposition to the FNGI is indeed exemplary of the deep belief on the existence of inherent rights and self-determination that prevails among First Nations leaders.

⁷⁵ AFN, “Speaking Notes for AFN National Chief Matthew Coon Come at the Conference ‘Beyond the Indian Act’.” April 17, 2002.

⁷⁶ AFN, “First Nations Plan.” February 2002. <<http://www.afn.ca/02-02-10%20FNplan.pdf>> (Retrieved 22 May 2002).

⁷⁷ AFN, “Speaking Points For AFN National Chief Matthew Coon Come And Vice Chief Ghislain Picard At An Appearance Before The Standing Committee on Aboriginal Affairs.” Cf. *supra* Note 6.

⁷⁸ Don Bain, “Nault’s Consultation Process Is Just an Elaborate ‘Con Game’,” *Canadian Aboriginal News*, 01/05/01.

The consultation process associated with the FNGI reform process had also been attacked as lacking “true participation”. The consultations scheme, organized unilaterally by DIAND, had indeed not been appreciated by First Nations leadership who felt overlooked by the government or by First Nations members who have been reluctant to participate. According to the DIAND Preliminary Findings,⁷⁹ out of the 470 000 registered Indians over 15 years old,⁸⁰ only 9000, or less than 2%, have participated in the first stage of the consultation process – whether by attending one of the 470 consultation and information sessions, responding to the questionnaires, or using the interactive media made available by DIAND. In Manitoba, for instance, some meetings had no attendance at all.⁸¹ This issue of appropriate process and methods is crucial from the perspective of “self-determination”. Self-determination principles accord more importance to the process of determining one people’s own destiny and political future than on the result itself. The result might actually be similar to the one wished by the colonial authority – establishing democratic parliamentary institutions with strong economic dependency on central institutions. However, the colonial authority cannot confiscate voice and initiative from Indigenous populations, and then invite them to join and react to its initial idea. The ‘self’ loses meaning and relationships are damaged. The consultation methods chosen by the government were definitively not well thought out, because they mistake government-sponsored polling methods for true inclusion in the process. This is indicative of a process that wants to establish self-government without having a preliminary process of political self-determination. In the case of the Indian Act, this inconsistency is particularly hurtful for the Aboriginal communities:

A fundamentally flawed process can only produce fundamentally flawed results. Consider that the Indian Act was *unilaterally* designed and implemented by the federal government, and imposed on First Nations. So, what is the Minister’s remedy? To *unilaterally* design and implement changes and then impose them on First Nations. This is *the same process that resulted in the original Indian Act*. I have said before that it is a form of insanity to continue the same behaviour and expect different results.⁸²

This extract from the RCAP Report is a good example of the symbolic importance and logics underlying the discourse of self-determination.

⁷⁹ Canada: Department of Indian and Northern Affairs Canada, “What We’ve Heard - Preliminary Findings.” Transcript of the official text. <http://www.fng-gpn.gc.ca/PF_intro_e.asp> (Retrieved on 25 February 2002).

⁸⁰ Canada: Department of Indian and Northern Affairs Canada, “Registered Indian Population by Sex and Residence 2000.” Statistical Data from the Indian Register. <http://www.ainc-inac.gc.ca/pr/sts/rip/rip00_e.html> (Retrieved on 25 February 2002). Remark: over 550 000 peoples declared themselves North American Indian in the 1996 census.

⁸¹ Canada: Department of Indian and Northern Affairs Canada. “Community Consultations (Summaries).” <http://www.fng-gpn.gc.ca/CC_e.asp> (Retrieved on 25 February 2002).

⁸² AFN, “Speaking Notes for AFN National Chief Matthew Coon Come at the Conference ‘Beyond the Indian Act’.” April 17, 2002.

Aboriginal nations have accepted the need for power sharing with Canada. In return, they ask Canadians to accept that Aboriginal self-government is not, and can never be, a 'gift' from an 'enlightened' Canada. The right is inherent in Aboriginal people and their nationhood and was exercised for centuries before the arrival of European explorers and settlers. It is a right they never surrendered and now want to exercise once more.⁸³

In other words, the type of self-government that results from this self-determination approach is "equal to, never derivative of nor subordinate to the self-governing authority of the more powerful national communities."⁸⁴ As this present section illustrates, the expression 'self-government' can mean many different things according to the intellectual and ideological framework of the interlocutor. Instead, the expression "self-determination" describes more appropriately the diverse arguments heard against the FNGI. Of course, other criticisms exist: for instance, the conservative argument that specifically Aboriginal policies should not exist in the first place, nor should self-governance practices. The FNGI can also be criticized for proposing governance methods and institutions that are too expensive for example. However, the arguments grouped under the articulated discursive framework of self-determination are the ones that are heard the most among First Nations peoples. These arguments fundamentally shape public debates on the initiative. Most importantly, however, they are representative of an international Indigenous movement, indicative of the latest developments in international law, and illustrative of deeper misunderstanding in Canadian Aboriginal politics. This study helps understanding the continuities within contemporary debates on Aboriginal issues and the intellectual hypotheses present behind important politics.

⁸³ RCAP, *Highlights from the Report of the Royal Commission on Aboriginal Peoples: People to People, Nation to Nation*, volume 3 "Restructuring the Relationship", (from the CD-Rom *For Seven Generations*, Published by Libraxus Inc.).

⁸⁴ Murphy, 114.

CHAPTER 4: CONCLUSION

4.1. Making sense of the “dialogue of the deaf”

In this thesis, I have isolated two conflicting discourses that are of utmost importance in shaping Canadian debates around Aboriginal issues. This type of discourse analysis sheds new lights on the events and reactions surrounding the FNIGI. More importantly, it provides a theoretical context, broader than simple policy analysis, and studies the FNIGI as an indicator of the state of Canadian Aboriginal politics. The opposition and criticism triggered by the FNIGI represent more than conflicts of interests; they also express deep normative differences between representatives of the Canadian federal government and the First Nations leadership. These representatives operate within two conflicting and self-contained discourses or frameworks of meaning – with little communication possible between the two. Hence, I have chosen to use the phrase “dialogue of the deaf” to encapsulate this miscommunication. On one hand, we have the discourse of good governance: a discourse which is useful and potentially empowering for First Nations communities, but which is also colonial because of the political structure on which it depends. Such a discourse is perceived as *aggressive* in theory if not in practice, by most First Nations members, because it symbolizes the unbalanced power relationships between federal government and First Nations. On the other hand, we have the discourse of self-determination: a discourse theoretically liberating because it grants symbolic individual and collective rights to Indigenous peoples, but the concrete/practical propositions of this discourse are often unrealistic or at least, imprecise.

The first discourse, the discourse of good governance, focuses on administrative reforms, institutional modernization, and efficiency. However, it does not confront directly issues of authority, jurisdiction, and balance of powers in the Canadian polity. Because it consciously avoids these issues, this indirectly perpetuates a system that is colonial, paternalistic and oppressive. In this respect, the approach chosen by the federal government to inform about

and promote the reform was ill-chosen. The consultations about the FNGI organized by DIAND were particularly problematic. A particularly significant problem was the Department's decision to bypass the First Nations leadership by trying to reach directly "grassroots" First Nations members. The opposition of the leadership to the FNGI and their criticisms of the federal government's attitude were also denigrated in the media.¹ These attitudes and methods reaffirmed the federal government's "ultimate power" to govern and legislate for First Nations peoples directly. The argument used to justify these methods, drawing on the fashionable and attractive rhetoric of direct democracy, is invalid in this case as the participation rates in the consultation process were very low and disparate. In this case, direct democracy methods do not fulfil its goals in terms of representativeness any better than indirect democracy through the elected chiefs and the AFN. One cannot consistently denigrate a group (the Chiefs and councillors especially as represented in the AFN) as biased because their position is dependent on the *Indian Act's* political institutions while at the same time arguing in favour of strengthening and modernizing the very same system. Given the Western and Canadian standards of democratic representation, the AFN is one of the most democratic and representative Aboriginal organizations. It operates as a legislative assembly – where all the Chiefs who are elected by their band members are allowed to participate and to elect national representatives and an executive. In the end, the government's strategy can be interpreted as more than an attempt to bypass the reluctant and interest-biased leadership, it can also be interpreted as an act of power, reaffirming the jurisdiction of the federal government and DIAND over First Nations peoples. This is the position chosen by the proponents of the discourse of self-determination who refuse to have a reform imposed upon them and ask instead for official recognition of inherent and treaty rights.

The second discourse focuses on legal, constitutional or political recognition of specific rights in terms of self-government, self-determination, and sovereignty. This discourse attaches importance to symbolism in politics. This focus on the official recognition of Aboriginal rights is not unique to Canada. For example, in Australia, recent reforms and actions taken to promote Aborigines' rights have been gathered within an ambitious "reconciliation" project, attaching significance to public declarations – apologies especially – by government officials, public demonstrations, and court rulings. However, there are some negative ramifications to this justified but excessive focus on official rights' recognition that are relevant to the current debates surrounding the FNGI. Firstly, such an approach involves lengthy and uncertain

¹ See for instance Robert Fife, "Ottawa loses faith in Coon Come," *National Post*, December 18, 2001.

judicial processes or international initiatives. Secondly, these issues are often considered as secondary by national and international authorities and thus suffer from lack of publicity, lack of funding and general lack of interest (outside Indigenous communities). More importantly, this approach presents difficulties in terms of proposing concrete solutions for improving daily governance and socio-economic conditions of Indigenous populations until rights are officially recognized and afterwards. In fact, most actors have trouble anticipating the form of authentic self-government and self-determination at a pragmatic, material level. Moreover, financial issues should be seriously taken into account. Indeed, the financial pressures are so heavy on Aboriginal communities that potential “true” self-government would always risk being jeopardized by financial dependency. The future self-determined and self-governed communities are likely to face a Third World-type of situation, i.e. the dependency situation experienced today by independent but poor decolonised states. These are the situations (excessive debt and dependence on international financial institutions) identified in the second chapter as experimentation fields for “good governance” methods. The discourse of self-determination, however, rightfully insists on the construction of self-governing institutions on strong legal and political bases. The history of the *Indian Act* in Canada and the embedding of this piece of legislation in paternalistic and colonial frameworks make it an inherently inappropriate base to overcome oppressive policies of the past.

Negotiation and bargaining between these two discourses is made difficult and almost impossible by the very nature of their concerns and goals. When using the terms “self-government”, “self-governance”, and “Aboriginal rights”, the discourse of “good governance” refers to administrative reforms and localized institutional reforms, while the overall structure of powers remains unscathed. In contrast, when talking about “self-government”, “self-governance”, and “Aboriginal rights”, the discourse of self-determination refers to legal and moral principles, human and collective rights, decolonisation of Canadian institutions, historical reparation and, ultimately, sovereignty recognition and affirmation. Similarly, the “governance” to which these two sides refer connotes two very different strategies: decentralization (for the federal government) versus the recognized right to self-government (for the First Nations opposition). This ideological gap is the real apple of discord, because interests can be reconciled by bargaining, but principles cannot. The debates are thus doomed to misunderstandings and futility as each discourse situates its expectations at radically different levels: the former is trying the change the policies while the latter is trying the change the whole polity. Some agreements could occur between the two actors and some advancement could be

made in the debates around the FNIGI, but these will very likely remain superficial. Instead, the situation today seems blocked: the FNIGI offers limited options to the federal government. It has the difficult task of choosing between working without First Nations' support or participation and therefore sinking deeper into paternalism and neo-colonialism, or remaining in a costly status-quo, fuelled by the controversial and inappropriate nature of the *Indian Act*.

4.2. Perspectives on the future of the FNIGI

As described above, no progress has been made towards an agreement on the FNIGI. Instead, the positions crystallize and the same arguments in favour of or against the FNIGI are repeated endlessly. This repetition is significant, as today we are witnessing a replay of the Bill C-79 scenario. Indeed, there are many similarities between Minister Nault's project and former reform proposals (that have been rejected or aborted previously) such as the reform proposed by Minister Irwin in 1996, *Indian Act Optional Modification Act* or Bill C-79. Minister Irwin's project was aiming at "tidying up" the *Indian Act* and increasing control of First Nations over day to day business.² Like the FNIGI, the draft bill C-79 proposed among others, a reform of the electoral system for band councils and chiefs, an extension of the by-law powers of the band councils, "an increased accountability for financial management"³, and a clarification and simplification of administrative procedures⁴. Not only the content of the project, but also its intent and the approach chosen in the reform process, were very similar to the current FNIGI. Consultations with First Nations peoples and organizations, for instance, played an important role.⁵ Although neither the federal government nor many commentators⁶ noted the similarity between the FNIGI and this former reform project, on both sides of the debate, the documents in the archives could easily be recycled and the speeches would not need much editing to fit the

² Canada: Department of Indian and Northern Affairs Canada. News Release. "Irwin Addresses Standing Committee on Aboriginal Affairs on Optional Modification Act (March 4, 1997)." <<http://www.ainc-inac.gc.ca/nr/prs/j-a1997/1-9672.html>> (Retrieved on 25/02/02).

³ *Ibid.*

⁴ Canada: Department of Indian and Northern Affairs Canada. "Indian Act Optional Modification Act - Summary (December 1996)." <<http://www.ainc-inac.gc.ca/nr/prs/s-d1996/9657su.html>> (Retrieved on 25/02/02).

⁵ In a speech on March 4, 1997 to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, Minister Irwin explained that "this bill [is] the latest in a series of actual or proposed reforms going back to 1985, and it reflects what First Nations have been saying for nearly 40 years," Canada: Department of Indian and Northern Affairs Canada. Speaking notes for the Honourable Ronald A. Irwin Minister of Indian Affairs and Northern Development. "Speech at the House of Commons Standing Committee on Aboriginal Affairs and Northern Development - Hearings on Bill C-79, the Indian Act Optional Modification Act House of Commons (March 4, 1997)."

<http://www.ainc-inac.gc.ca/nr/spch/1997/9672sn_e.html> (Retrieved on 25/02/02).

⁶ Paul Barnsley for the *Windspeaker* was one the few journalist referring back to Bill C-79. See Paul Barnsley, "New Plan Reminiscent of (Ron) Irwin," *Windspeaker* (February 2001).

present situation. The arguments used by both Mr. Irwin and Mr. Nault to justify their respective proposals echo each other almost perfectly. For example, when responding to accusations that Bill C-79 is paternalistic, Mr. Irwin declared:

The whole concept of the Indian Act is paternalistic and that is why First Nations are working so hard to replace it by self-government agreements. But as long as it exists, we have to operate within its confines. The question is "what are we doing within those confines?" and this answer is that Bill C-79 would give First Nations greater control over, and greater responsibility for, their own lives and their own communities.⁷

On the contrasting side of the debate, the contemporary AFN Grand Chief, Ovide Mercredi, was also virulent in his attacks on the reform project:

The AFN Chief says the land-management provisions would effectively abolish the traditional notion of community-held property and thus threaten the survival of reserves. He also complained Mr. Irwin is trying to undermine national leadership by dealing directly with local communities and not consulting the AFN.⁸

Once again the same arguments are heard today regarding the FNGI. Eventually, Bill C-79 died on the order paper due to the Canadian general election in 1997.

Reflecting on the past allows us to anticipate more accurately the future of the FNGA. More generally, the history of Indigenous-White relations in Canada, like that similar settlers' states in the world, is one filled with failures. Human failures are particularly prevalent, as are policy failures. These are the failures of the Aboriginal policies themselves (in regards to their own, sometimes unfortunate objectives): failed physical assimilation, failed cultural and political assimilation, failure to guarantee good living conditions, and failure to confront and come to terms with their colonial history. Because of the depth of the disagreement between the two types of actors (the obstinate federal government and the recalcitrant First Nations leadership), there are many reasons to doubt the success of the FNGI as well. Either the FNGA will die on the order paper (like Bill C-79) or, if implemented, will have only limited effects because of the resistance of the Aboriginal leadership. In 1997, in her critique of Minister Irwin's "inherent rights" policy and intended changes to the Indian Act, Joyce Green noted:

⁷ See *supra* Note 4.

⁸ As reported in Shafer Parker Jr., "Two-faced on the *Indian Act*: the Chiefs fight attempts to weaken a law they ostensibly despise", *Western Report* (January 6, 1997).

Ottawa's "inherent rights" policy simply delegates administrative powers. It is incremental change of a trivial nature. . . . The state . . . continues to formulate "self-government" as a modification of the existing federal arrangement, permitting either inherent or delegated powers to be exercised in relation to federal and provincial powers and in relation to those citizens subject to the various jurisdictions. The state seeks to contain indigenous resistance in terms that maintain state supremacy and its justifying legal mythology. This is explicit in the "inherent rights" policy: "the inherent right of self-government does not include a right of sovereignty in the international law sense, and will not result in sovereign Aboriginal nation-states."⁹

The same analysis can be applied to today's situation and the FNGL. The federal government, with Minister Nault but also Prime Minister Jean Chrétien, who experienced one of the most famous failures in Aboriginal policy (the *White Paper*), seems more committed today than in 1996-1997. Still, the effective implementation of the changes depends on the good will of the chiefs and band councils that are in charge of the government and administration of *Indian Act* bands.

To unblock the situation, a more radical approach to Aboriginal rights such as the one proposed in the RCAP Final Report should be adopted:

Only when "Aboriginal rights" will be clearly defined and institutionalized, will there be opportunities for the federal government and the Aboriginal leadership to discuss more openly the implementation and practice of an officially recognized right to self-government. Blockages and oppositions are still likely to occur, because of diverging interests and economical/financing issues but an agreement on the meaning and content of Aboriginal rights seem to be a necessary first step in building more fertile partnership between First Nations and Canada.¹⁰

4.3. Building better political systems

The questions confronted in this thesis have broader implications than just for Aboriginal politics. They are part of a renewed critique of traditional nation-state models and help us to understand broader contemporary political phenomena, such as globalization and the search for a more meaningful liberal democracy. The challenges that Aboriginal activism and Indigenous movements pose to contemporary Western democracies are important in testing the flexibility and capacity for renewal of modern liberal democracy. These attacks on the traditional model of the nation-state are not only the most significant challenges to contemporary liberalism, but also potentially its greatest strength. Indeed, in these times of post-colonialism and globalization, the liberal model of democracy is the one that has displayed the most flexibility

⁹ Joyce Green, "Options for Achieving Aboriginal Self-Determination," *Policy Options*, March 1997, 11 & 12.

¹⁰ RCAP, *Highlights from the Report of the Royal Commission on Aboriginal Peoples: People to People, Nation to Nation*, volume 3 "Restructuring the Relationship", (from the CD-Rom *For Seven Generations*, Published by Libraxus Inc.).

and opportunities for renewal. Kymlicka's works are indeed exemplary of the adaptations that can be made to accommodate collective rights.¹¹ The liberal model of democracy supports universalism on the basis that it leaves room for any conception of the good and thus is religiously and culturally tolerant, and because theoretically it allows everyone to participate in the political life. Aboriginal peoples' movements are testing this universalism. A negative resolution of these internal conflicts could make liberal democracies more authoritarian and ethnocentric than they are now. In contrast, a positive resolution could validate, to some extent, liberal pretensions to universalism. The fact that these groups are using Western tools to challenge Western hegemony is in itself an encouraging sign of the capacity for self-critique and self-improvement such a system possesses. However, unfortunately, these groups are relatively powerless when facing well-established governments and embedded colonial inheritance at regional and national levels.

Similarly, by affirming the irreconcilability of the discourses of "good governance" and of "self-determination", I am not siding in favour of a radical cultural relativism but rather I am denouncing Western arrogance when dealing with non-western societies and calling on more modesty from Western decision-makers. Discourse analysis is an interesting tool from this perspective as it allows for a reaffirmation of the importance of normative values in political discourse without falling into universalistic prescriptions. As explained by Williams and Young:

At some point the textual analysis of the theoretical implausibility of the 'universal law' must be supplemented by the political and anthropological analysis of what those who imagine they possess such a law are enabled to do to others as a result. To track governance to its real lair, it is this logic that needs further investigation.¹²

Discourse analysis highlights the relationships of power and pretension to truth but also allows for reinstatement of ideologies and politics within public debate (against the so-called "neutrality" of consensual, common-sense, economically sound, and efficient neo-liberal policies). Although Minister Nault tries to convince the public that the FNGI "is not about politics" and "is not intended to be controversial,"¹³ such an analysis demonstrates on the contrary that Aboriginal policies are indeed about politics and that politics are largely about contending ideologies – and this is why they are controversial.

¹¹ See for instance Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon Press; New York, USA : Oxford University Press, 1989).

¹² Williams and Young, 100.

¹³ In a speech on April 30, 2001 at the Siksika First Nation High School. See *supra* Note 28 in Chapter 2.

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APPENDIX A: FNGI – CHRONOLOGY

2001

March	Minister Robert Nault announces he has received a cabinet mandate to amend the <i>Indian Act</i> .
April 30	the national plan called “Communities First: First Nations Governance” is officially launched. This is the first phase of Consultations.
May	resolution 1/2001: the AFN rejects the FNGI and is calling for a boycott of consultations by all First Nations.
July	First Nations leaders and activists react violently to the FNGI (in particular in Eastern Canada).
August	cooling-off period.
September	DIAND and the AFN agree on working together on a working plan.
November	the Joint Ministerial Advisory Committee (JMAC) is established.
December	at the Confederacy of Chiefs meeting, the AFN votes against the governance plan established by the executive of the AFN in collaboration with DIAND. The AFN refuses to have a representative in the JMAC.

2002

January	the final report for the first phase of the consultations is published.
February	the AFN presents its alternative plan, the “First Nations Plan”.
March	the JMAC presents its final report to Minister Robert D. Nault.
May 22 & 23	resolution 3/2002: the AFN reaffirms its opposition to the FNGI.
June 14	the FNGA (Bill C-61) is introduced in the House of Commons.
September 16	the Parliament’s session is adjourned.
October 9	the FNGA (Bill C-7) is reintroduced in the House of Commons.

2003

February the Standing Committee organizes some consultation meetings in Ottawa and in the other major cities in Canada.

Timeline proposed by the government:

The estimated time frame for implementation, expressed in fiscal years, is as follows:

2002-03: Royal Assent

2003-04: Regulations finalized

2004-06: Two-year transition period

It is projected that the FNGA would be completely implemented by April 1, 2006.

APPENDIX B:

DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

Recognizing also that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

Considering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination,

Encouraging States to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples:

PART I

Article 1

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 5

Every indigenous individual has the right to a nationality.

PART II

Article 6

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext. In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.

Article 7

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- (e) Any form of propaganda directed against them.

Article 8

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

Indigenous peoples have the right to special protection and security in periods of armed conflict. States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

- (a) Recruit indigenous individuals against their will into the armed forces and, in particular, for use against other indigenous peoples;
- (b) Recruit indigenous children into the armed forces under any circumstances;
- (c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes;
- (d) Force indigenous individuals to work for military purposes under any discriminatory conditions.

PART III

Article 12

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Article 14

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

PART IV

Article 15

Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

Article 16

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

Article 17

Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

Article 18

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.

Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary.

PART V

Article 19

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them. States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 21

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 22

Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

PART VI

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous

peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

PART VII

Article 31

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 32

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Article 34

Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

Article 35

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.

States shall take effective measures to ensure the exercise and implementation of this right.

Article 36

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

PART VIII

Article 37

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 38

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

Article 39

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

Article 40

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, *inter alia*, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 41

The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

PART IX

Article 42

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 43

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 44

Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

Article 45

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

Source:

From <<http://www.unhchr.ch/huridocda/huridoca.nsf/2848af408d01ec0ac1256609004e770b/e4fc6deefb3b06c802566cf003bea67?OpenDocument#res45>>.

Site of the United Nations Office of the High Commissioner for the Human Rights.

Referencing information: Distr. GENERAL E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (28 October 1994) 36th meeting on 26 August 1994.

APPENDIX C:

DEFINITION OF "INDIGENOUS PEOPLES"?

Definitions of Indigenous Peoples

The passage above is an attempt to explain the term indigenous peoples. However, there is no unambiguous definition of the concept of 'indigenous peoples'. The most widespread definitions are those proposed in the International Labour Organization (ILO) Convention no.169 and in the Martínez Cobo Report for the UN Sub-Commission on the Prevention of Discrimination of Minorities (1986).

Furthermore a definition suggested by the Chairperson of the UN Working Group on Indigenous Populations Mme. Erica-Irene Daes is widely used.

The definition outlined by the Chairperson of the United Nations' Working Group on Indigenous Populations, Mme. Erica-Irene Daes designates certain peoples as indigenous,

- *because they are descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origins arrived there;*
- *because of their isolation from other segments of the country's population they have preserved almost intact the customs and traditions of their ancestors which are similar to those characterised as indigenous; and*
- *because they are, even if only formally, placed under a State structure which incorporates national, social and cultural characteristics alien to theirs.*

According to the Martínez Cobo Report for the UN Sub-Commission on the Prevention of Discrimination of Minorities (1986), indigenous peoples may be defined as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

- a) Occupation of ancestral lands, or at least of part of them;
- b) Common ancestry with the original occupants of these lands;
- c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- e) Residence in certain parts of the country, or in certain regions of the world;
- f) Other relevant factors.

The ILO Convention no. 169 states that a people are considered indigenous either

- *because they are the descendants of those who lived in the area before colonization;*
- *because they have maintained their own social, economic, cultural and political institutions since colonization and the establishment of new states.*

Furthermore, the ILO Convention says that self-definition is crucial for indigenous peoples. This criterion has for example been applied in a land-claims agreement between the Canadian government and the Inuit of the Northwest Territories.

Source:

In depth topic "Indigenous Peoples" on [globalissues.net](http://www.globalissues.net), issues information, research & resources on global issues. <<http://www.globalissues.net/guide/indigenouspeoples>>
Retrieved on 25 January 2003.